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No. ____

In the Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK
AND THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state partially accommodate itself to the policies of a federal agency without conceding that the federal agency can effectively preempt state regulation?

2. Does a federal Circuit Court err when it concludes a federal agency has not shown why the agency has jurisdiction, but nonetheless allows preemption of state regulation?

3. Is the Federal Energy Regulatory Commission (FERC) precluded from regulating a merchant electric generating facility's receipt of electricity for end-use consumption, given that federal authority does not reach retail sales and service?

PARTIES

Petitioners are the People of the State of New York and the Public Service Commission of the State of New York.

Pursuant to Rule 29.6 of this Court's Rules, Petitioners People of the State of New York and the Public Service Commission of New York State, which is a governmental agency, do not need to file a corporate disclosure statement.

Niagara Mohawk Power Corporation is petitioning separately for certiorari.

Intervenors in the court below were: Reliant Energy, Inc., Nine Mile Point Nuclear Station, LLC, Keyspan-Ravenswood, LLC, New York Power Authority, Dunkirk Power, LLC, Huntley Power, LLC, Oswego Harbor Power, LLC, and Northeast Utilities Service Company.

The Respondent is the Federal Energy Regulatory Commission.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit, Pet. App. B, is at 452 F.3d 822. The Court's orders on rehearing (Pet. App. A) are not officially reported, but can be found at 2006 U.S. App. LEXIS 26326 and 2006 U.S. App. LEXIS 26333 (D.C. Cir. 2006).

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 2006. The Petition for Rehearing and Rehearing *En Banc* was filed within 45 days of the D.C. Circuit's judgment. D.C. Circuit Rule 35. The Orders Denying Petition for Rehearing and Rehearing *En Banc* were issued October 23, 2006. The Petition for Certiorari is timely because it was filed within 90 days from the date of denial of the Petition for Rehearing and Rehearing *En Banc*. Supreme Court Rule 13(3). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 824 (FPA § 201) provides in pertinent part:
§ 824. DECLARATION OF POLICY; APPLICATION OF SUBCHAPTER

(a) Federal regulation of transmission and sale of electric energy.

It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part

of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Omitted.

(c) Electric energy in interstate commerce.

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined.

The term "sale of electric energy at wholesale" when used in this subchapter means a sale of electric energy to any person for resale.

* * * * * *

16 U.S.C. § 824k(h) (FPA § 212(h)) provides:

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions.

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

> (A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 USCA §§ 901 *et seq.*]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

STATEMENT OF THE CASE

Petitioners, People of the State of New York and the Public Service Commission of the State of New York (NYPSC) which regulates retail electric rates and service for some six million customers, petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit (Griffith, J., Silberman, J., Edwards, J.). The decision under review concluded that the Federal Energy Regulatory Commission (FERC) had not clearly articulated why the Federal Power Act (FPA) allowed FERC to preempt state regulation of the provision of end-use electricity to merchant generators. The District of Columbia Circuit (D.C. Circuit) nonetheless upheld FERC's decision to preempt State regulation because of the NYPSC's willingness to partially tolerate a FERC approach to the supply of end-use energy to merchant generators. The NYPSC was willing to accept hourly "netting" of generator output versus input because it did not unduly prevent State regulation of retail services. The D.C. Circuit concluded that the State's willingness to tolerate some "netting" meant it was bound to accept any netting FERC might impose, even if state regulation of retail sales and service to generators was thereby effectively precluded.

This Court recently reaffirmed the principle that the States, not FERC, have jurisdiction over retail sales and local distribution of electricity. *New York v. F.E.R.C.*, 535 U.S. 1, 23-24 (2002) [". . . New York retains jurisdiction of the ultimate sale of the *energy* . . . FERC has recognized that the States retain significant control over local matters . . ." (emphasis in original)]. As this Court recognized, FERC ostensibly respected state jurisdiction. *Id.* at 12, 14, 16, 20, 28.[1] Further, this Court distinguished FERC's exclusive jurisdiction over the unbundled *transmission* of energy from state jurisdiction over the sale and local distribution of that energy to end-use customers when states, such as New York, create retail competition by unbundling retail electric rates. *New York v. F.E.R.C.*, 535 U.S. at 11-12, n. 9.

Merchant Generators Become
A New Class Of End-Use Customers

As a result of New York's policies to promote electric competition, the NYPSC provided for the divestiture of electric generation plants owned by utilities, such as Petitioners Niagara Mohawk Power Corporation, *et al.* (Niagara Mohawk). That divestiture created independent "merchant generators," which are no longer affiliated with utilities in New York. That is, merchant generators became separate corporate entities from utilities; they produce energy to sell into the wholesale market, which is managed, in New

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[1] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services By Public Utilities*, Order No. 888, FERC Stats. & Regs. ¶31,036, 75 FERC ¶61,080, 1996 FERC LEXIS 777, April 24, 1996 ("*FERC Order 888* "), *Transmission Access Policy Group v. F.E.R.C.*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. F.E.R.C.*, 535 U.S. 1, 122A S. Ct. 1012 (2002).

York, by the New York Independent System Operator (NYISO).

Like other large industrial electric customers, however, merchant generators must also purchase electricity to use on their premises. The energy that merchant generators consume is known as "station power." It includes "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site." *PJM Interconnection, L.L.C.*, Order on Petitions for Declaratory Order and Supplemental Order on Rate Application, 94 FERC ¶61,251, 61,889 (March 14, 2001)("*PJM II*"). FERC has ruled that station power is an "end-use" of electricity not subject to its jurisdiction over wholesale sales (*PJM II* at 61,891). FERC has also ruled that when a merchant generator can use the power it generates to "self-supply" its station power, FERC does not have jurisdiction over that practice. *KeySpan-Ravenswood Inc. v. NYISO*, Order Granting Rehearing And Establishing Hearing And Settlement Judge Procedures, Docket No. EL01-50-001, 100 FERC ¶61,201, 2002 FERC LEXIS 1728 (August 21, 2002) ¶ 2, Appendix ("App.") at 175a.

FERC Orders Affecting Merchant Generators' End-Use Services

Even though FERC disclaimed jurisdiction over merchant generators' end-use of electricity, it approved a NYISO tariff that effectively preempts the NYPSC from regulating merchant generators' station power services. Merchant generators cannot truly self-supply their station power at all times because they must be taken out of service occasionally (usually for maintenance). When generators are off-line they

must take electricity from another source. The NYPSC has issued orders setting stand-by rates for sale of station power to merchant generators in situations where generators must draw from other sources.[2]

FERC has preempted the NYPSC orders inasmuch as it has concluded that a merchant generator will be *treated* as if it has "self-supplied" *all* of its station power when the amount the merchant generator produced for the wholesale market at the end of one month is more than the amount it consumed from the NYISO in that month (what FERC calls "positive net output"). FERC decided that under such circumstances, state regulation is preempted because the FPA limits state jurisdiction to the "sale" of electricity at retail and, when a generator has a "positive net output," no sale of any kind has taken place *at any point* in the month in question. App. at 36a-37a. According to FERC, New York State may not assert jurisdiction over any station power services provided during a month in which a merchant generator is net positive and no local distribution facilities are used to deliver station power to the merchant generator from the NYISO. App. at 37a-38a.

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[2] NYPSC Case 00-E-0757, *Declaratory Ruling On Jurisdiction Over Stand-by Service* (issued and effective September 29, 2000), 205 PUR4th 431 (2000), *petition dismissed as moot, KeySpan-Ravenswood v. Public Service Comm'n of State of N.Y.*, 7 A.D.3d 837, 776 N.Y.S. 2d 143 (3rd Dep't 2004) [wherein challenge to NYPSC Declaratory Ruling was dismissed on procedural grounds but the court nonetheless stated that stand-by rates should apply "when a wholesale generator purchases electricity for its station power"]; NYPSC Case 03-E-1016, *Order Approving Tariff Filing* (issued and effective November 25, 2003), 2003 N.Y. PUC LEXIS 672.

The NYPSC Challenges FERC's Reasoning And Legal Conclusion

Initially, New York did not object to FERC's "self-supply" policies because FERC first required that the NYISO calculate merchant generators' netted energy on an hourly basis, which is the same timeframe used by the NYISO to calculate generators' bills for the station power that is delivered to them. App. at 158a; *see* 121a-122a.[3] The NYPSC protested, however, when FERC required that the NYISO net station power on a monthly, rather than an hourly, basis because that practice materially interferes with the utilities' ability to recover costs for the provision of station power services to merchant generators, particularly local distribution service.

Before FERC, the NYPSC asserted that through the netting of the *costs* of energy consumed by a merchant generator against the value of energy produced, a state-jurisdictional retail sale occurs. The NYISO accounts for that retail sale insofar as it measures and bills the generators for the station power provided. App. at 169a.[4] The NYPSC also

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[3] In other words, the NYISO measures both the wholesale energy it receives from generators and the amount of station power it provides merchant generators on an hourly basis.

[4] The NYPSC stated that:

> When a generator does not operate, . . . its netting of the cost of the energy delivered to it [from the NYISO's power supplies] against the price [the NYISO] paid for its prior production is a retail sale, . . . While the Commission has jurisdiction to decide what is a wholesale sale, it concedes
>
> (continued...)

pointed out to FERC that the tracking and accounting process of netting "adequately supports development of proper charges for delivery system usage." App. at 156a.

The D.C. Circuit Upholds FERC's Actions Without Citing Support For Them In The Federal Power Act

The NYPSC, along with a group of utility petitioners, challenged the FERC decision. In its decision upholding FERC, the D.C. Circuit characterized FERC's jurisdictional rationale as "a bit confusing." *Niagara Mohawk Power Corp. et al. v. F.E.R.C.*, 452 F.3d 822 (D.C. Cir.), *reh'g denied*, 2006 U.S. App. LEXIS 26326 (D.C. Cir. 2006), Opinion at Pet. App. B., p. 14a ["(FERC) insists that no sale *of any kind* takes place when a generator takes power from the grid for station power service," (emphasis in original)]. The D.C. Circuit noted that FERC had not relied upon its FPA jurisdiction over wholesale sales to order netting (App. at 14a-15a, n.7). It stated that FERC had "not clearly articulated" how its only remaining jurisdiction, over the transmission of electric energy in interstate commerce, empowered FERC to preempt state law by declaring that "no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid." App. at 15a.

Despite the Circuit Court's finding that FERC had "not clearly articulated" any statutory basis for its actions, the

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[4](...continued)

> that none is present in station use [*citing PJM II at 61,894*]; once that determination is made, the Commission lacks the jurisdiction to rule that the energy consumed is not a retail sale.

court decided that FERC's orders were lawful based upon an alleged concession by Petitioners. The D.C. Circuit saw Petitioners' acceptance of hourly netting as a concession that netting *per se* would not violate the FPA. It stated,

> [t]he difficulty we see in petitioners' jurisdictional argument . . . is their clear concession that an hourly netting tariff would not violate the Act – which is a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary . . . in its initial brief, petitioner Public Service Commission clarified that it 'does not disagree with netting *per se* . . .'

Id. The court also pointed to an alleged NYPSC concession at oral argument that hourly netting would be permissible because it was "a valid policy judgment on the part of FERC to determine that no retail sale occurred and that no local distribution service was utilized if a generator was net positive over an hour."[5] App. at 15a-16a.

The D.C. Circuit accordingly concluded that "if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act." App. at 16a. It reasoned that "if we were to accept petitioners' logic, *any* netting out of what it deems 'retail sales' over *any* period would amount to a statutory violation." *Id.*

The D.C. Circuit also upheld FERC's orders insofar as they precluded the State from imposing "local delivery" charges, pursuant to state retail tariffs. App. at 8a. The court relied upon FERC's conclusion that all the merchant

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[5] The NYPSC contests any such concession, *see* Point 1, *supra*.

generators in this case "are connected directly to transmission facilities," with no intervening local distribution facilities. App. at 9a. It reasoned that FERC's earlier "recognition" (in FERC Order 888) that "an end user takes local distribution *service* even if, in fact, it does not physically use a utility's local distribution facilities . . ." was a "fiction" and that FERC "[was] not required to extend this fiction to the new creature in the market, the wholesale generator." App. at 16a-17a.

Finally, the D.C. Circuit decided that hourly netting can be viewed as "an accounting entry," rather than a "[retail] sale" pointing to FERC's argument that the NYISO bills on a monthly basis. App. at 19a.

REASONS FOR GRANTING THE WRIT

This case raises legal issues and policy concerns that go to the heart of this nation's dual system of government. As this Court held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S. 159, 172-173 (2001),

> . . . Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority [citation omitted]. This concern is heightened when the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

The Court should grant certiorari to address how a dual federal/state regulatory structure can work, when state accommodations to federal power are read as concessions depriving states of jurisdiction. The Court should also grant

certiorari to consider the impact of the Circuit Court's approach to separation of powers. Only Congress can give authority to federal agencies, but the D.C. Circuit found authority in an alleged State concession. It also allowed a federal agency to act, while questioning its authority to do so. This Court has concluded that a federal agency cannot preempt state regulation unless it acts within the scope of its authority; the Circuit Court, however, did not require FERC to show such authority. Review by this Court will resolve whether a state can "cede" its police power over retail electric service to the Federal government by making a policy accommodation. Further, it will confirm that a federal agency cannot preempt state-jurisdictional services without explaining its statutory basis for doing so.

This case also raises questions as to what extent courts will follow this Court's decision in *New York v. F.E.R.C.* That decision upheld continuing state authority over retail sales and delivery service, even for customers served at the transmission level. The D.C. Circuit has allowed FERC to defeat that authority. Granting certiorari will allow the Court to resolve specific questions that have arisen in New York and California and will continue to arise elsewhere as states move towards competitive electric markets. Those questions are whether the station power merchant generators consume is a state-jurisdictional service, and particularly, whether the netting of retail energy against wholesale sales means there is no retail sale.

1. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THE DUAL FEDERAL-STATE REGULATORY REGIME FOR ELECTRICITY

The D.C. Circuit ruled that FERC had the legal authority to require a netting period to measure merchant generators'

station power self-supply, and to set it at one month, because New York made a "clear concession" that, under certain circumstances, federal jurisdiction exists even over end-use services. App. at 15a [wherein the court stated that the "concession that an hourly netting tariff would not violate the Act . . . is a recognition that in drawing the jurisdictional lines in this area, some practical accommodation is necessary"]. It is impossible, however, for a state to create jurisdiction in a federal agency where there is none. The lower court's reasoning was contrary to this Court's precedent and will significantly impair the dual roles of state and federal regulation. If the D.C. Circuit's decision that New York's accommodations amounted to an abdication of the State's statutory power over merchant generators' end-use services is allowed to stand, states will be far less willing to accommodate federal policies. The D.C. Circuit's decision will contribute to the demise of state and federal compromise by making litigation the safest means of resolving every jurisdictional dispute.

A State Cannot Cede Jurisdiction To FERC

FERC "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. F.E.R.C.*, 535 U.S. at 18 (quoting *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986)). Treating New York's acceptance of hourly netting as deferring to FERC to make decisions statutorily reserved to the states is contrary to the basic principle that FERC derives its power from Congress, not New York.

It is well-established that "[p]arties, of course, cannot confer jurisdiction; only Congress can do so." *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973); *see*

Columbia Gas Transmission Corp. v. F.E.R.C., 404 F.3d 459, 463 (D.C. Cir. 2005) ["[J]urisdiction cannot arise from the absence of objection, or even from affirmative agreement"]. A party's concession should not be accepted out of hand if "the ultimate question may be jurisdictional ..." *Whitman v. DOT*, ___ U.S. ___, 126 S. Ct. 2014, 2015 (2006).[6] "FERC cannot exercise jurisdiction or authority unless authorized by statute, regardless of whether the jurisdiction is exercised without objection or even with the consent of the relevant parties." *Bonneville Power Admin. v. F.E.R.C.*, 422 F.3d 908, 924 (9th Cir. 2005) (citing *Columbia Gas Transmission Corp. v. F.E.R.C.*, 404 F.3d 459, 461 (D.C. Cir. 2005)).

In Any Event, New York State Did Not Concede Its Jurisdiction Over End-Use Service.

In focusing on the practical difference between 1-hour netting versus 1-month netting, the D.C. Circuit lost sight of the NYPSC's fundamental argument that, under the FPA, FERC has no jurisdiction to regulate the provision of station power because that service is an end-use, retail service. Justice Griffith recognized this "fundamental" question. App. at 136a [Justice Griffith [to FERC]: "When you determine it's not wholesale, doesn't that end your authority and your

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[6] The D.C. Circuit's reliance on a concession is also at variance with its rejection of FERC's attempt to assert jurisdiction over local distribution in the Midwest ISO. As the court stated, "[w]hat FERC really seems to be arguing, though, is that a state somehow cedes its jurisdiction over unbundled retail distribution if it unbundles retail service or if a public utility voluntarily provides it. This proposition finds no support in law." *Detroit Edison Co. v. F.E.R.C.*, 334 F.3d 48, 54 (D.C. Cir. 2003).

jurisdiction?"]. It is a question that FERC (and the court below) never adequately answered.[7]

It is up to the NYPSC, not FERC, to decide whether and, if so, how, the self-supply of station power is regulated because such self-supply lies within state authority over retail rates. The FPA unequivocally preserves state jurisdiction over the retail sale of electricity to end-use customers. 16 U.S.C. § 824(b). "FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market." *New York v. F.E.R.C.*, 535 U.S. at 20.[8] "[C]onsumers who purchase electric energy for their own use (*i.e.*, not for resale), are not wholesale customers; they are retail consumers." *Schuylkill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 416, n.14 (3d Cir.), *reh'g denied*, 1997 U.S. App. LEXIS 13210 (3d Cir.), *cert. denied,* 522 U.S. 977 (1997).

Inasmuch as the NYPSC regulates retail energy use, it can accept hourly netting as an accommodation without violating the Federal Power Act. In contrast, monthly netting imposed on a state without its consent violates the Act's limitation on

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[7] *See* App. at 14a-15a, n.7 ["neither in its brief nor in the orders below has FERC asserted that its jurisdiction to order station power netting is founded on its statutory jurisdiction over wholesale sales"]; *see also* App. at 15a [FERC "has not clearly articulated why (its transmission) jurisdiction permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid"].

[8] The FPA also states that FERC has *no* jurisdiction over facilities used for the generation of electric energy (*i.e.*, the merchant generators' facilities). 16 U.S.C. § 824(b).

FERC's jurisdiction. Thus, contrary to the D.C. Circuit's conclusion, App. at 15a, Petitioners' willingness to accept hourly netting is not a "difficulty" for them, but an appropriate exercise of state police power with respect to utility rates and services. Similarly, while the D.C. Circuit recognized the need for "practical accommodation," it failed to see that the accommodation was made pursuant to the NYPSC's authority over retail sales and service. The D.C. Circuit misunderstood NYPSC counsel to the extent it concluded that the State had conceded that FERC had authority under the FPA to preempt state law; the NYPSC was asserting, not abdicating, its authority.[9]

The D.C. Circuit's conclusion that monthly "netting" cannot violate the FPA because hourly netting does not, fails to recognize the states' discretion to accommodate federal policies. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The NYPSC was entitled to "tolerate" (*see* App. at 166a) FERC's hourly netting policy because, in the NYPSC's judgment, that policy does not unduly trample upon the State's police powers.[10]

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[9] *See* App. at 116a [". . . at some point administrative agencies including the (NYPSC) has to make policy decisions about what is reasonable in the market"].

[10] As the D.C. Circuit itself acknowledged, there is a distinction between acquiescing to a policy that has no ill effect and challenging one that does. If a party "is satisfied with the practical impact of the order . . . that does not foreclose its ability to challenge the principle as beyond the agency's statutory authority when the agency later

(continued...)

In ignoring the statutory underpinnings of the jurisdictional dispute before it (Points 2 and 3, below) and imputing to the State a concession that FERC had statutory authority to impose netting, the D.C. Circuit created a new, unprecedented, rule of law. That rule would create federal agency jurisdiction if a court finds that a litigant has conceded jurisdiction by choosing, for practical reasons, not to challenge the agency's actions. The D.C. Circuit confused the NYPSC's *exercise of its authority to agree* that one-hour netting would be reasonable with New York's *abdication of its sovereign authority* to regulate in the first instance. Inasmuch as the FPA unequivocally limits FERC's authority to regulating "wholesale sales," FERC has no authority to regulate practices that are not wholesale sales. Therefore, the NYPSC has jurisdiction to determine whether the self-supply of station power involves the "sale" of electricity and, if so, how to regulate such practice. This Court should grant certiorari to review FERC's unlawful preemption of state authority.

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[10](...continued)
utilizes it to cause substantial injury." App. at 13a-14a. Here, the NYPSC had no practical objection to hourly netting since the NYISO bills on an hourly basis. The NYPSC cannot be said to have waived its jurisdiction under the FPA by simply acknowledging that hourly netting is acceptable. The NYPSC's lack of a quarrel with netting *per se*, if used only on an hourly basis, is distinct from a challenge, on statutory grounds, of a FERC application of monthly netting that causes "substantial injury" by defeating state jurisdiction.

2. THE D.C. CIRCUIT IMPROPERLY UPHELD FERC JURISDICTION WITHOUT IDENTIFYING THE STATUTORY BASIS UPON WHICH FERC WAS AUTHORIZED TO ACT.

The D.C. Circuit recognized that FERC did not clearly articulate a statutory basis for its actions. App. at 14a-15a. It described FERC's jurisdictional rationale as "a bit confusing" because FERC had not relied upon its jurisdiction over "wholesale sales" (App. at 14a-15a, n.7) and had "not clearly articulated" why its jurisdiction over the transmission of electric energy in interstate commerce permits FERC to preempt state law by "determin[ing] that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid. App. at 15a.

This Court, in *New York v. F.E.R.C.*, made it clear that in cases where FERC has pre-empted state law, a court is required "to be certain that Congress has conferred authority on the agency." *New York v. F.E.R.C.*, 535 U.S. at 18. Similarly, in *Whitman v. DOT*, 126 S. Ct. at 2015, the Court specifically noted that a court is "required to ascertain first" where the agency's actions fit within the statutory scheme. The Circuit Court was thus obliged to independently analyze whether FERC had statutory authority to approve a NYISO netting tariff that preempted state law. *New York v. F.E.R.C.*, 535 U.S. at 18 ["the best way to (determine) whether federal power may be exercised in an area of pre-existing state regulation [ ] is to examine the nature and scope of the authority granted by Congress to the agency" (internal quotations omitted)] (quoting *La. Pub. Svc. Comm'n. v. F.C.C.*, 476 U.S. at 374); *see Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S. at 172-173 [Where an administrative agency's statutory interpretation alters the federal-state framework to encroach

upon a traditional state power, there must be a clear indication that Congress intended that result]; *see also Household Credit Services, Inc. v. MBNA America Bank*, 541 U.S. 232, 238 (2004) [wherein the Court of Appeals was reversed because it made no attempt to clarify the scope of the critical statutory term and instead, "rested its holding primarily on its particular characterization of the transaction"].

3. PURSUANT TO *NEW YORK v. FERC* AND THE FPA, WHICH SAFEGUARD STATE AUTHORITY TO REGULATE END-USE ELECTRIC SERVICES, FERC CANNOT REGULATE END-USE SALES AND DELIVERY SERVICES.

FERC's Jurisdiction Does Not Allow It To Compel Netting

Had the Circuit Court completed the requisite statutory analysis, it would have concluded that FERC had not shown a statutory basis for its action because there is none. FERC infers its jurisdiction on the basis of a theory that states do not have jurisdiction over the provision of end-use energy to a generator because there is no retail sale when a generator is "net" positive. Inasmuch as FERC does not have jurisdiction over end-use sales, it does not have the authority to decide whether a retail sale takes place.

As the D.C. Circuit noted, FERC did not attempt to rely on its authority over wholesale sales to reach the generators' use of energy. App. at 14a-15a.[11] Further, FERC has ruled

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[11] *See PJM II*, at 61,894 [wherein FERC did "not accept the proposition that, simply because electricity is used by generators as

(continued...)

that it does not have jurisdiction over a merchant generator's "self-supply" of station power. *KeySpan-Ravenswood Inc. v. NYISO*, Order Granting Rehearing And Establishing Hearing And Settlement Judge Procedures, Docket No. EL01-50-001, 100 FERC ¶61,201, 2002 FERC LEXIS 1728 (August 21, 2002) ¶ 2 ["we (have) held that a generator's self-supply of station power is *not within our jurisdiction* as it does not involve a sale"], App. at 176a. As such, FERC does not have jurisdiction to approve a tariff regulating self-supply of station power.

Further, FERC could not have regulated end-use services to merchant generators by virtue of its FPA jurisdiction over retail transmission. The transmission of energy is different from the ultimate use of that energy. That is, end-use station power is a energy service in the first instance, while transmission is a delivery service. *See New York v. F.E.R.C.*, 535 U.S. at 19-20 [wherein the Court noted that, for jurisdictional purposes, the statute unambiguously identifies transmitting energy and selling energy as "two separate activities . . . ."]; *Id.* at 23, ["Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*" (emphasis in original)].[12]

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[11](...continued)
an input for the production of wholesale energy, this somehow converts the provision of station power into a wholesale transaction subject to (federal) jurisdiction"].

[12] The D.C. Circuit recognized, but did not apply the distinction between energy and delivery when it stated that "it does not follow that hourly netting of power necessarily dictates hourly netting for transmission and distribution costs." App. at 19a.

Supply Of Station Power To Generators Is A Retail Sale

In *New York v. F.E.R.C.*, this Court acknowledged that states retain "jurisdiction over the sale of power. . ." 535 U.S. at 12, 14, 16, 20; *Id.* at 23 ["New York retains jurisdiction of the ultimate sale of the *energy*" (emphasis in original)]. FERC implicitly concluded that state authority over end-uses is limited to retail sales, preempting state regulation of station power transactions by relying on an unduly constrained reading of the statutory term "sales." Even if one assumes, *arguendo*, that state jurisdiction is limited to "retail sales," such sales still occur whenever end-use energy is provided to a merchant generator and then netted against wholesale energy provided by the merchant generator.

FERC's conclusion that a generator "netting" to meet its energy needs is not engaged in a retail sale is without merit. The D.C. Circuit improperly stated that FERC could regard netting of station power as an "accounting entry rather than an actual sale." App. at 19a. Its conclusion disregards that even when netting is used, real value is exchanged. "There is no doubt that energy exchanges are considered sales . . . ." *Public Utilities Comm'n of Cal. v. F.E.R.C.*, 462 F.3d 1027, 1060-61 (9th Cir. 2006) [wherein the Circuit Court rejected FERC's argument that "there is no way to assign a monetary value" to energy exchanges in the wholesale market and required FERC to order Exchange Sellers to pay refunds to California ratepayers]. Ballentine's Law Dictionary defines a sale as "[a] transfer of the property in a chattel for a consideration." *Ballentine's Law Dictionary* 1133 (3d ed. 1969). Here, merchant generators purchase station power from the NYISO because that end-use energy is reflected in

reduced payments from the NYISO, as computed on an hourly basis. Thus, netting constitutes a retail sale.

Moreover, the oral argument before the D.C. Circuit strongly suggests that merchant generators purchase end-use station power when the generator is out of service. When the court queried FERC about station power, FERC agreed that an out-of-service generator has to "pay" for the station power it uses:

> Judge Silberman: . . . if I'm a merchant generator . . . I need to pull power off the grid to start my generator, to turn my lights on, put my fax on, et cetera, I have to pay for that power to the grid on an hourly basis?
>
> Mr. Solomon: Yes.
>
> Judge Silberman: But, nevertheless, your position is for purposes of transmission, there is no sale. Now, what the devil's happened with respect to the hourly if it's not a sale? I mean the power?

App. at 121a-122a. FERC never answered the question.

FERC has accepted that station power was a retail sale "subject to both retail transmission rates and state-jurisdictional local distribution charges" when another *generator* is the source of power. App. at 10a. However, FERC argues that there is no sale when the *NYISO* is the source of power. *See id.* In either case there is a transfer of energy for value. Merchant generators' receipt of station power from the NYISO should be recognized for what it is – an end use sale subject to state jurisdiction.

FERC Does Not Have Jurisdiction Over End-Use Delivery Services

The D.C. Circuit upheld FERC's finding (App. at 67-68a, 73a-75a) that state-jurisdictional delivery services are not provided to merchant generators because no actual local distribution facilities are used. App. at 16a-17a. The court dismissed the NYPSC's argument that it retained jurisdiction over local distribution services for merchant generators by concluding that FERC Order 888's allowance that, "there is some element of local distribution in any retail transaction" (FERC Order 888 at ¶31,781) was a legal "fiction" created by FERC, which FERC was not required to apply to merchant generator services. App. at 17a. The D.C. Circuit erred, however, insofar as it assumed that allowance was a *FERC-created* "fiction," subject to change at FERC's will. In upholding FERC's assertion of jurisdiction over retail transmission in Order 888, this Court, in *New York v. F.E.R.C.*, specifically noted FERC's decision not to assert jurisdiction over

> the *service* of delivering electric energy to end users . . . State regulation of most power production and virtually all distribution and consumption of electric energy is clearly distinguishable from this Commission's responsibility to ensure open and non-discriminatory interstate transmission service. Nothing adopted by the Commission today . . . is inconsistent with traditional state regulatory authority in this area.

New York v. F.E.R.C., 535 U.S. at 11-12, n. 9 (emphasis in original) quoting *FERC Order No. 888 at 31,782-31,783*). As this Court explained in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453, 468 (1972), local

distribution is a legal standard that the agency must recognize and the courts must enforce. *Florida Power & Light*, 404 U.S. at 467;[13] *see Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 531 (1945) ["The expression 'facilities used in local distribution' is . . . a limitation on jurisdiction and a legal standard that must be given effect . . . in addition to the technological transmission test"].

In *New York v. F.E.R.C.*, the Supreme Court recognized the need to protect state jurisdiction over local delivery services provided to retail customers taking the newly-created "unbundled retail transmission." *See* 535 U.S. at 23. In NYPSC Case 00-E-0757 and Case 03-E-1016, the NYPSC ruled that merchant generators, like other large industrial customers, are obligated to pay "stand-by rates," reflecting their intermittent need for and use of retail delivery services and, where applicable, their customer contribution to stranded costs. New York exercised its jurisdiction under the existing statute over merchant generators as a new category of end-use customers, created by competition. *See, e.g., New York v.*

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[13] The Court stated,

> It is not true, as argued by respondent, that an engineering test of certainty is needed to reserve an area of state jurisdiction. On top of the 'engineering and scientific test' that controls this case, the Federal Power Act imposes a 'legalistic or governmental' test. Federal jurisdiction may not reach 'facilities used in local distribution' of energy. 16 U.S.C. § 824(b). Thus, state jurisdiction is clearly demarcated and preserved. *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945).

Florida Power & Light, 404 U.S. at 467.

F.E.R.C., 535 U.S. at 21, n.13 ["Rather than claiming 'new' jurisdiction, the Commission is applying the same statutory framework to a business environment in which . . . retail sales and transmission service are provided in separate transactions . . . . Because these types of products and transactions were not prevalent in the past, the jurisdictional issue before us did not arise . . .]. New York has a substantial interest in having the merchant generators pay for the costs of serving them, and avoiding placing those costs on other ratepayers.

Ultimately, when such changes take place, such as the creation of new end-use customers in the newly-independent merchant generators, "we are left with the statutory text as the clearest guidance." *New York v. F.E.R.C.*, 535 U.S. at 23. FERC's assertion of jurisdiction over merchant generators' end-use transactions in contravention of the FPA should be reviewed and reversed; the NYPSC decisions regulating such end-use services should be given legal effect.

CONCLUSION

For the reasons stated above, the Court should grant Petitioner NYPSC's Petition for Certiorari and reverse the D.C. Circuit's decision upholding FERC.

Respectfully submitted,

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January 19, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227
Consolidated with 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144

[Filed October 23, 2006]

Niagara Mohawk Power Corporation, Petitioner	)
v.	)
Federal Energy Regulatory Commission, Respondent,	)
Reliant Energy, Inc., et al., Intervenors	)

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson,* Randolph,* Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges, and Edwards and Silberman, Senior Circuit Judges

* Circuit Judge Henderson and Randolph did not participate in this matter.

ORDER

Upon consideration of petitioner Public Service Commission of the State of New York's petition for rehearing en banc, and for the responses thereto; and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:/s/_____
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227
Consolidated with 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144

[Filed October 23, 2006]

Niagara Mohawk Power Corporation, Petitioner	)
v.	)
Federal Energy Regulatory Commission, Respondent,	)
Reliant Energy, Inc., et al., Intervenors	)

BEFORE: Griffith, Circuit Judge, and Edwards and Silberman, Senior Circuit Judges

ORDER

Upon consideration of petitioner Public Service Commission of the State of New York's petition for rehearing filed August 7, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:/s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227 Consolidated with 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144

[Filed June 23, 2006]

NIAGARA MOHAWK POWER CORPORATION, PETITIONER	)
v.	)
FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT;	)
RELIANT ENERGY, INC., ET AL., INTERVENORS	)

On Petitions for Review of Orders of the Federal Energy Regulatory Commission

Before: GRIFFITH, Circuit Judge, and EDWARDS and SILBERMAN, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

SILBERMAN, *Senior Circuit Judge*: New York electric power utilities and the New York State Public Service Commission petition for review of FERC orders approving and enforcing a tariff filed by the New York Independent System Operator (NYISO), the manager of New York's electric power transmission facilities. The tariff allows electricity generators that provide power to the transmission grid to avoid transmission and local distribution charges for the power these generators take from the grid for such purposes as heating, air conditioning, lighting, and powering office equipment (called "station power"), so long as the power the generators produce in any month exceeds the power taken. Petitioners assert, *inter alia*, that FERC's approval of monthly netting for NYISO was unlawful and unreasonable, and that the netting formula imposed in the NYISO tariff should be supplanted with a one-hour netting period. We deny the petition.

I

This case has its genesis in the unbundling of the New York electric energy market. The provision of electric energy to end users traditionally involves three components: electricity generation; high voltage, long-distance power transmission (transmission services); and finally lower voltage, local distribution of electricity from the transmission facilities to end users (distribution services). Prior to 1996, vertically integrated utilities in New York owned facilities covering all three components of this service. Subsequently, however, utilities began divesting their generation facilities, and the vast majority of electricity generation in the state of New York is now performed by independent wholesale generators. While the traditional utilities maintain ownership of the transmission and local distribution facilities, New York state's transmission grid today is operated and controlled by

the not-for-profit New York Independent System Operator, or NYISO. Thus, as we understand it, in the typical situation an independent wholesale generator produces the electricity, it is transmitted across the state over NYISO's transmission facilities (or grid), and it is then stepped-down and delivered to a retail user over a utility's local distribution lines.

Jurisdiction over this sale and delivery of electricity is split between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale. Under section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. States retain jurisdiction over retail sales of electricity and over local distribution facilities. Thus transmission occurs pursuant to FERC-approved tariffs; local distribution occurs under rates set by a state's public service commission.

The actual unbundling of the New York electric energy market after 1996 was made possible by FERC's Order 888,[1] which required, among other things, the *functional*

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, F.E.R.C. Stats.& Regs. ¶ 31,036, 61 Fed. Reg. 21,540, *clarified*, 76 F.E.R.C. ¶ 61,009, and 76 F.E.R.C. ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 F.E.R.C. ¶ 61,182, *on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 343 U.S. App. D.C. 151, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002).

unbundling of wholesale generation and transmission services. Under the order, integrated utilities were required to file with FERC open access non-discriminatory transmission tariffs, which applied to both transmission services offered to third-party generators and to the utility's own electricity transmissions. The order also encouraged the creation of independent system operators, such as NYISO, to ensure competitive pricing of transmission services and further reduce utilities' market power.

In addition to addressing open access, Order 888 reaffirmed states' jurisdiction over local distribution services. Order 888 stated that even when FERC's test for identifying local distribution facilities concluded that no such facilities were utilized in a given transaction, states still had authority over the *service* of delivering electric energy to end users. This determination was crucial, as it directly affected utilities' ability to assess end users for "stranded costs." These are costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become "stranded" with the utilities. By establishing that states have jurisdiction over local delivery *services* and not just local distribution *facilities*, Order 888 allows utilities to assess stranded costs on all retail users. This prevents large industrial customers, for example, from avoiding stranded costs assessments by connecting their plants directly to transmission facilities and stepping down the voltage of the power themselves. *See, e.g.*, *Detroit Edison Co. v. FERC*, 357 U.S. App. D.C. 210, 334 F.3d 48, 51 (D.C. Cir. 2003). Order 888 therefore allows states to "assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate."

With this statutory and regulatory background in mind, we turn to the subject matter of this consolidated petition - the treatment of station power in New York. FERC describes station power as the electricity used at a generating facility's site to power things such as heating, air conditioning, lighting, and office equipment. When a generator is operational, it might well be capable of redirecting some of its outbound generated electricity to its station power needs, thus "self-supplying" its station power "behind the meter." Certain generators, however, are physically incapable of supplying their station power behind the meter - for example, if produced power goes out to the grid on one set of power lines, and the facility's offices and electrical equipment are connected to a separate set of lines coming in from the grid. And even for those capable of self-supplying behind the meter, there may be periods when a generator is non-operational or only partially operational and thus incapable of meeting its station power demand. In such instances, generators - who at least in this case, as we understand it, are connected directly to transmission facilities - must look to the grid for their station power supply.

In a series of orders that preceded those here on review, FERC addressed the treatment of station power in the Pennsylvania-New Jersey-Maryland (PJM) electricity market.[2] The independent operator of that system's grid filed with FERC an amendment to its open-access transmission tariff proposing that generators be able to net, on an hourly basis, the station power pulled off the grid as "negative generation"

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[2] *See PJM Interconnection, LLC*, 93 F.E.R.C. ¶ 61,061 (2000); *PJM Interconnection, LLC*, 94 F.E.R.C. ¶ 61,251, *reh'g denied*, 95 F.E.R.C. ¶ 61,333 (2001); *PJM Interconnection, LLC*, 95 F.E.R.C. ¶ 61,470 (2001).

against energy supplied to the grid during that hour. So a generator that pulled station power off the grid for fifty minutes of an hour, for example, but then supplied well in excess of that amount during the final ten minutes, would be deemed to have supplied the netted amount to the grid and consumed nothing. Over objections that the provision of station power to a generator constituted *retail sales* outside FERC's jurisdiction, FERC approved the hourly netting and held that when a generator is net positive over the period, no sale has taken place.

FERC also acknowledged that a generator could engage in "remote self-supply" if its station power requirements over the netting period exceeded its gross output, but there was another off-site generator owned by the same entity that was producing sufficient excess electricity over that period to make up for the deficit. According to FERC, in such a case there likewise would be no "sale." But if a generator's station power requirements over the netting period exceeded its gross output, *and* the source of the power was a third party (i.e., there was no remote facility with sufficient excess supply), such a provision of station power would in fact be a sale for end-use outside FERC's jurisdiction. It would be a retail sale subject to both retail transmission rates and state-jurisdictional local distribution charges.

Among FERC's reasons for approving station power netting was that it would ensure that wholesale generators "do not bear a cost that has no relationship to any 'service' purportedly being provided by another party." Netting would therefore further reduce the disparities between wholesale generators and vertically-integrated utilities. FERC added that it would look favorably upon the use of a longer netting period, such as a day or a week; indeed in a fourth *PJM* order, FERC accepted a modification of the station power

tariff that changed the netting period from one hour to one month.

Not long after the final FERC order in the PJM matter, New York wholesale generator KeySpan-Ravenswood filed a complaint with FERC challenging NYISO's treatment of station power. On the basis of the *PJM* orders, KeySpan alleged that NYISO's treatment of station power was unjust and unreasonable because it left the matter to the "vagaries of local utilities." FERC agreed and directed NYISO to file a proposed revised tariff covering the provision of station power and allowing self-supplying wholesale generators to net station power over some reasonable period. FERC explained, however, that it was not necessary for NYISO's proposal to incorporate aspects of the PJM tariff that would be inappropriate for New York.[3]

II

The four pairs of orders under review are follow-ons to the initial *KeySpan-Ravenswood* proceedings.[4] In a tariff

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[3] *See KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 99 F.E.R.C. ¶ 61,167 (*KeySpan I*), *on reh'g*, 100 F.E.R.C. ¶ 61,201 (2002) (*KeySpan II*).

[4] The four pairs of orders under review are: *KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 101 F.E.R.C. ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 F.E.R.C. ¶ 61,142 (2004) (*KeySpan IV*); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 F.E.R.C. ¶ 61,336 (2003), *reh'g denied*, 110 F.E.R.C. ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 F.E.R.C. ¶ 61,337 (2003), *reh'g denied*, 110 F.E.R.C. ¶ 61,032 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 F.E.R.C. ¶ 61,169 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,120

approved by FERC in the first pair of these orders, NYISO determined that the appropriate station power netting period for New York was one month.[5] The utilities challenged that proposed tariff on a number of grounds, which they reiterate before us. It is their contention that monthly netting violates the Federal Power Act because, as a practical matter, it encroaches upon state jurisdiction over local distribution services and retail sales. Although we are not told how much retail sale of station power (and therefore local distribution charges) is left under a monthly netting regimen, we are given to understand that it would not be significant. Although FERC has acknowledged jurisdiction over the transmission of power over the grid, according to petitioners the monthly netting policy unlawfully extends federal jurisdiction over local distribution services and retail sales because it allows generators to avoid transmission and local distribution charges altogether.

Petitioners also assert that in the seminal Order 888, in which FERC laid the legal groundwork for the unbundling of the electric power market, FERC explicitly recognized that delivery services to end users remained under state jurisdiction and drew no distinction between the typical industrial end user and a power generator taking power from

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(2005). The latter three pairs of orders involve failed attempts by utility Niagara Mohawk to charge generators for delivery of netted-out station power, contrary to the *KeySpan* orders. In all instances, the generators were not physically connected to Niagara's local distribution facilities.

[5] The record does not indicate why NYISO chose one month over alternative netting periods. NYISO is an independent entity and is governed by a board of directors, none of whom is affiliated with market participants.

the grid. Assuming *arguendo* that FERC has jurisdiction to approve the tariff, petitioners' remaining significant argument is that the one month netting period is so long as to be unreasonable (arbitrary and capricious).

The Commission responds first by asserting that we lack jurisdiction over petitioners' arguments based on the Act and Order 888 because they did not, in a timely manner, petition for review of the earlier *PJM* orders and *KeySpan I*, in which the netting *principle* was adopted. *See* 16 U.S.C. § 8251(b). Petitioners claim that not all of them were parties to those earlier proceedings, and that in any event they were not aggrieved until FERC approved monthly netting in New York in *KeySpan III* and so had no right to seek review of the earlier orders. It is clear that petitioners were not dissatisfied with the prospect of there being some sort of station power netting in New York; indeed, as we emphasize below, petitioners have no quarrel with an hourly netting tariff. This, however, does not necessarily mean that they had no standing to challenge the earlier orders.

But even had petitioners all been parties to the earlier proceedings and been aggrieved by the *PJM*orders or *KeySpan I*, they would not have forfeited their right to challenge the principle of netting by not petitioning for review earlier. Even if a party technically can establish standing (aggrievement), it need not seek review if it is satisfied with the practical impact of the order; and that does not foreclose its ability to challenge the principle as beyond the agency's statutory authority when the agency later utilizes it to cause substantial injury.[6] *See Sacramento Mun. Util. Dist. v. FERC*,

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[6] Suppose the federal government decided to preempt state regulation of a highway, and the federal agency promulgated a rule reducing the speed limit from the state's seventy miles per hour to

368 U.S. App. D.C. 215, 428 F.3d 294, 299 (D.C. Cir. 2005) (identifying an objection "to the Commission's . . . statutory authority" as a typical situation in which "agency rules can . . . be challenged on substantive grounds when they are applied, even though the statutory period for judicial review has expired").

III

Petitioners' statutory argument is not insubstantial; the Commission's jurisdictional rationale is a bit confusing. It insists that no sale *of any kind* takes place when a generator takes power from the grid for station power service, so long as its netting is positive for the month. So FERC does not appear to rely on its wholesale jurisdiction (although the generator's delivery of power to the grid is a wholesale sale and the deduction made for station power taken is valued at the same wholesale price).[7] To be sure, FERC does have undoubted jurisdiction over interstate transmission (the grid), and the generators at issue in this case take station power

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sixty-five. While a common carrier utilizing the highway might technically be aggrieved by such a move and even doubt the legality of the exercise of federal power, it might not deem such slight harm worthy of a suit in federal court. Nonetheless, if the federal government later reduced the speed limit to forty-five - now causing significant harm to the carrier - nothing would bar the carrier from then challenging the government's preemption of state authority.

[7] At oral argument, counsel for FERC was asked, "But even if it was a sale it would be a wholesale sale in FERC's jurisdiction?" Counsel replied, "Yes, that is our jurisdictional hook"; but neither in its brief nor in the orders below has FERC asserted that its jurisdiction to order station power netting is founded on its statutory jurisdiction over wholesale sales.

directly from the grid. But it has not clearly articulated why that jurisdiction permits it to determine that no sale of any kind - including a retail sale - takes place when the generator takes station power from the grid.

The difficulty we see in petitioners' jurisdictional argument, however, is their clear concession that an hourly netting tariff would not violate the Act - which is a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary. Thus, utility petitioners argued for hourly netting below, *see, e.g.*, *KeySpan III*, 101 F.E.R.C. at ¶ 62,001, and in its initial brief, petitioner Public Service Commission clarified that it "does not disagree with netting *per se*." Counsel for the utilities reaffirmed this shared sentiment at oral argument. In response to a question from the panel as to whether the utilities had any objection to hourly netting, counsel said, "No, we were, in fact, proposing that [before the Commission]." Counsel elaborated that, "I have to speak for my clients which are the utility petitioners and they have no problem with the hour[ly netting,] but the State, who has the legal authority to regulate that retail sale and determine the measurement period[,] may feel differently." But then counsel for the "state" - the New York Public Service Commission - also conceded that hourly netting would be permissible. Questioned further by the panel, counsel agreed that it would be a valid policy judgment on the part of FERC to determine that no retail sale occurred and that no local distribution service was utilized if a generator was net positive over an hour. According to counsel, the real issue is that "an hour . . . recognizes more reasonably the fluctuations which FERC says in its decisions, it wants to recognize." And "[o]ne month does not recognize fluctuations."

Petitioners object to monthly netting because it eliminates

many - perhaps virtually all - of the station power transactions, and a shorter netting period would eliminate fewer. But if we were to accept petitioners' logic, *any* netting out of what it deems "retail sales" over *any* period would amount to a statutory violation. It is possible to measure the power taken from the grid over a shorter period than an hour. Indeed, it apparently could be done in real time. If the Federal Power Act, as petitioners contend, prevents NYISO from exerting authority over state-jurisdictional transactions by netting them out, then any such exertion must be a violation. And, on the other hand, if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act.

Nor do we see anything in Order 888 that buttresses petitioners' jurisdictional argument. Although the Commission used the term "end users" in that order without qualification - and it might well have been open to FERC to interpret the order as treating generators like typical end users - FERC has made it clear that the Order's purpose was to prevent large industrial and commercial users from avoiding their share of a utility's stranded costs. Generators who purchased their facilities from utilities, according to FERC, are deemed to have paid a premium to cover some part of these stranded costs, and thus are in a quite different position from a retail user. It is, therefore, certainly a reasonable interpretation of Order 888 to carve out an exception from the term "end user" for wholesale generators. Petitioners would hang their hat on Order 888's recognition that an end user takes local distribution *service* even if, in fact, it does not physically use a utility's local distribution facilities - which is really a

fiction, if a reasonable one[8] - but FERC is not required to extend this fiction to the new creature in the market, the wholesale generator.

In any event, petitioners' concession equally undermines their argument based on Order 888. If generators must be thought of as equivalent to industrial end users, then hourly netting would be equally illegitimate; and if not, we do not see how the language of that order would permit netting over one hour but not one month.

IV

Petitioners' argument, based on the APA - that the Commission's approval of monthly netting is unreasonable - is, of course, not affected by their concession. But it will be recalled that FERC did not mandate a one month netting period; it only approved NYISO's choice. And it had cautioned that its approval of an hourly netting tariff in the adjacent Pennsylvania-New Jersey-Maryland market did not establish a required approach. Indeed, as we noted, FERC subsequently approved a modification to that tariff providing for monthly netting. FERC observed, in later approving the NYISO tariff, that a monthly netting period in New York would have the benefit of creating uniformity with the adjacent PJM energy market to the south. Petitioners respond that the New England market operates with hourly netting, but that does not rebut FERC's position that both might be reasonable.

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[8] Paradoxically, FERC's reasoning that the generators should not have to pay for local distribution services they do not take is exactly what it rejected in Order 888 when presented with industrial users who wished to bypass the local utilities' distribution facilities and connect directly to transmission lines.

As should be apparent, the monthly netting tariff will result in less revenue - a good deal less, according to petitioners - flowing from the generators to the utilities. FERC's concern seems to be only that some version of netting is necessary in order to put wholesale generators in roughly the competitive position integrated utilities enjoy and that monthly netting presumably puts the generator closer to a competitor who might never need to take power from the grid. Petitioners claim that this competitive concern is really irrelevant in the New York market because there are few integrated utilities left. FERC responds that there are some remaining and that other utilities purchase power for resale and are, therefore, continuing to compete with wholesale generators. Of course, the New York wholesale generators are also competing with generators and integrated utilities in the PJM market. In sum, we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable.

The strongest point petitioners make is that one month is inconsistent with the hourly method by which actual power, as opposed to transmission costs, is priced. Pricing of electricity in New York is performed on an hourly basis. Any time a generator pulls electricity off the grid, that withdrawal is accounted for at what is called a locational-based marginal price (LBMP). Injections of electricity into the grid by generators are likewise accounted for at the appropriate LBMP. Thus even if a wholesale generator has positive net output over the month and is treated as having made no "purchase" of station power over that period - and thus treated as having used no transmission or local delivery facilities in connection with that netted out station power - the wholesale generator still is held accountable for the actual electricity consumed. This, according to petitioners, is an

indication that the parties recognize that a sale took place (and, according to petitioners, a retail sale), and so for transmission and distribution purposes hourly netting is similarly required. But FERC reasonably regards that hourly charge as an accounting entry rather than an actual sale of power, and it does not follow that hourly netting of power necessarily dictates hourly netting for transmission and distribution costs. As FERC also notes, NYISO's billing and accounting practices are *month*-based.

* * *

Accordingly, for the reasons stated, we deny the petition.[9]

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[9] Petitioners make a series of additional arguments, which we need only mention briefly. They argue that the FERC orders violate both the filed rate doctrine and the rule against retroactive ratemaking. The "filed rate," petitioners contend, is Part IV of the NYISO tariff, which applies to retail service. This is but a variation on petitioners' other arguments, as it relies on the proposition that the provision of station power service within the netting period is a state-jurisdictional retail sale. As explained above, this argument cannot withstand petitioners' concession that hourly netting is appropriate. Petitioners also argue that the *Huntley* and *AES Somerset* orders violate the rule against retroactive ratemaking because they allow the generators to net station power beginning in July 1999, well before the April 1, 2003 effective date of the NYISO station power netting tariff. But without there having been a preexisting relevant filed rate, there can be no retroactive alteration of it. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).

The Public Service Commission argues that FERC's orders have the effect of discriminating against cogeneration facilities, who do not have the benefit of netting station power; but this argument is foreclosed because it was not raised below. *See* 16 U.S.C. § 8251(b). Finally, utility petitioners argue that the station power tariff violates NYISO's governance structure because NYISO's management committee did not approve the tariff filing. We find this argument meritless since NYISO was *required* to make such a filing to comply with the Commission's order in *KeySpan I*.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-234-000

[Filed December 23, 2003]
As Amended January 15, 2004

Nine Mile Point Nuclear Station, LLC	)
	)
v.	)
	)
Niagara Mohawk Power Corporation	)
	)

ORDER GRANTING COMPLAINT

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly

1. On September 26, 2003, Nine Mile Point Nuclear Station, LLC (Nine Mile) filed a complaint pursuant to section 206 of the Federal Power Act (FPA), alleging that Niagara Mohawk Power Corporation (Niagara Mohawk) is interfering with Nine Mile's ability to obtain station power service under the Market Administration and Control Area Services Tariff (Services Tariff) of the New York Independent System Operator, Inc. (NYISO). This order grants Nine Mile's complaint and directs Niagara Mohawk to take actions in

conformance with the findings in the order. This action benefits customers by resolving disputes over station power-related services.

COMPLAINT

2. Nine Mile states that it purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000 and has operated the two units at that station since that time. Nine Mile has received station power service[1] under Niagara Mohawk's retail tariff SC-7.[2] Nine Mile states that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff.[3] The NYISO Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (i.e., remote self-supply).

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[1] Nine Mile relies on the definition of station power found in NYISO's Market Administration and Control Area Services Tariff (Services Tariff). See New York Independent System Operator, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 67A, Section 2.172c.

[2] P.S.C. No. 207 Electricity, Service Classification No. 7 (Sale of Standby Service to Customer With On-Site Generation Facilities).

[3] NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24.

3. Nine Mile states that, based on its operations to date, it expects that each generating unit will experience positive net output over the monthly netting period provided under the NYISO Services Tariff. To the extent a unit experiences a prolonged outage, Nine Mile states that it intends to self-supply that unit's station power remotely from power generated by the sister unit. Nine Mile concludes that, under Commission precedent, it will be entirely self-sufficient with respect to station power. Nine Mile asserts that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged. Thus, there should be no retail service charges from Niagara Mohawk.

4. Nevertheless, Nine Mile asserts that Niagara Mohawk has not responded to Nine Mile's notice of termination but rather intends to continue to assess retail charges on Nine Mile and has threatened suspension of delivery service for non-payment. Nine Mile also alleges that Niagara Mohawk is failing to assist NYISO in the administration of its station power rules and that NYISO will thus be unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power. Nine Mile concludes that Niagara Mohawk's stance jeopardizes the implementation of station power service under the NYISO Services Tariff and will impose unlawful retail charges on Nine Mile as well as potentially inaccurate charges by NYISO by virtue of Niagara Mohawk's failure to provide NYISO meter information needed for accurate administration of the NYISO settlement process. According to Nine Mile, these practices will result in hundreds of thousands of dollars in unlawful charges.

5. Nine Mile cites to several Commission orders[4] for its contention that merchant generators like Nine Mile that self-supply station power are not subject to retail charges since there is no sale for end use, and further that when a generating station nets station power, no state jurisdiction attaches to the delivery of any power consumed, because such delivery does not involve a "sale," as long as no facilities classified as local distribution facilities are involved, which Nine Mile states is the case here. Nine Mile posits that generators that only remotely self-supply over facilities subject to this Commission's jurisdiction, i.e., its circumstance, are only responsible for rates subject to this Commission's jurisdiction. The complaint repeats Commission conclusions that the determination of whether a generating facility has positive net output can be measured over a reasonable time period,[5] and that a utility cannot require a merchant generator to take retail station power service under retail rates.[6]

6. Nine Mile requests that the Commission: (1) direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile's accounts are net positive for each month, through either on-site or remote self-supply of station power; (2) direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power;

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[4] See, e.g., PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001) (PJM II), order denying reh'g and providing clarification, 95 FERC ¶ 61,333 (2001) (PJM III); KeySpan-Ravenswood, Inc., 101 FERC ¶ 61,230 (2002), reh'g pending (KeySpan III).

[5] See PJM II, 94 FERC at 61,892.

[6] Id.

and (3) grant other necessary and appropriate relief to allow Nine Mile to self-supply station power service.

ANSWER

7. In its Answer, Niagara Mohawk frames the issue in this case in terms of whether it may recover under its state-approved retail tariff charges for the delivery of energy consumed by Nine Mile's generating plants. Niagara Mohawk asserts that the Commission and the courts have confirmed that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the Commission found, in Order No. 888,[7] that recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission facilities.[8] Niagara Mohawk concludes that Order No. 888's

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[7] See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (TAPS), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[8] Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on

statement that states have jurisdiction in all circumstances over the service of delivering energy to end users includes circumstances involving no "sale" of energy from one party to another.

8. Niagara Mohawk states that, since July 1, 2002, it has provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Rates under the SC-7 classification are "stratified" so that charges to customers taking service at a higher voltage do not include the costs of lower voltage distribution facilities. Usage under the SC-7 rate classification is measured in 15-minute increments. The New York Public Service Commission (New York Commission), Niagara Mohawk states, approved Niagara Mohawk's SC-7 rate classification, finding that the SC-7 rates are consistent with state policy that provides that generators receiving delivery of station power should be required to pay their allotted share of stranded costs and stranded benefits. The bulk of the charges to customers like Nine Mile under SC-7, Niagara Mohawk claims, are stranded cost and benefit charges.

9. According to Niagara Mohawk, states retain jurisdiction over the service of local delivery of power regardless of the type of facilities used to provide that service. Niagara Mohawk cites to Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (Detroit Edison), where, Niagara Mohawk maintains, the court vacated an order that allowed a retail customer to take delivery service under a FERC-approved

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usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." Id.

tariff rather than a state-approved retail tariff. Niagara Mohawk interprets the court's decision as concluding that the Commission cannot allow an end user to take local delivery service under a FERC-jurisdictional tariff, and thereby interfere with the state's attempt to allocate stranded costs, because to do so exceeds the Commission's statutory authority.

10. Niagara Mohawk next analyzes this precedent in the context of station power, citing Northeast Utilities Services Co. v. NRG Energy, Inc.[9] In that case, the Commission held, among other things, that transmission providers may impose state-approved charges on retail deliveries of station power. In a more recent ruling "clarifying" NU, according to Niagara Mohawk, the Commission confirmed its position that the state has jurisdiction to approve charges for the service of delivering electricity to end users, including charges for the recovery of retail stranded costs and benefits.[10] Niagara Mohawk concludes that the rates in its SC-7 tariff for its delivery of station power to Nine Mile fully satisfy the rate design guidelines outlined by the Commission in Warrior Run. Niagara Mohawk reasons that, because the New York Commission has exercised its jurisdiction to impose retail charges for the local delivery of electricity to generator end users, including shares of stranded costs and benefits, Nine Mile's claim "that the NYISO's federal tariff applies

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[9] 101 FERC ¶ 61,327 (2002) (NU), rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co., 104 FERC ¶ 61,051 (2003), reh'g pending (Warrior Run).

[10] See Warrior Run, 104 FERC ¶ 61,051 at ¶ 15-17.

exclusively and preemptively to all aspects of its station power delivery service is simply wrong."[11]

11. Finally, Niagara Mohawk cites several policy reasons for recognizing state jurisdiction over local delivery service. First, it argues that depriving state regulators of this jurisdiction would take away their authority to impose non-bypassable distribution or retail stranded cost charges. As a consequence, Niagara Mohawk speculates, this would open an avenue for bypass of state stranded cost and benefit charges for all those who could restructure existing transactions to bring themselves within the definition of "self-suppliers," resulting in a heavier burden for those other customers unable to exploit it. Last, Niagara Mohawk warns that such a regime would drag the Commission into the process of retail ratemaking, forcing it to "assume the role of arbiter of retail stranded cost recovery issues."[12]

NOTICE, INTERVENTIONS, COMMENTS, AND RESPONSIVE PLEADINGS

12. Notice of Nine Mile's complaint was published in the Federal Register, 68 Fed. Reg. 57,685 (2003), with motions to intervene and comments due on or before October 20, 2003. The New York Commission filed a notice of intervention and comments, and supplemental comments, opposing the complaint. Timely motions to intervene raising no substantive issues were filed by NRG Companies (NRG),[13]

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[11] Answer at 3.

[12] Id. at 20.

[13] NRG consists of NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power

the New York Power Authority, and Northeast Utilities Service Company on behalf of the NU Operating Companies. Timely motions to intervene and comments in support of the complaint were filed by Long Island Power Authority and LIPA (LIPA), the Independent Power Producers of New York, Inc. (IPPNY), AES NY, L.L.C. and AES Eastern Energy, L.P. (AES), and Reliant Resources, Inc. (Reliant). New York Transmission Owners (NY Transmission Owners)[14] filed a timely motion to intervene and comments opposing the complaint.

13. Among those supporting the complaint, AES believes that the Commission should reaffirm its prior rulings that Niagara Mohawk has no authority to bill Nine Mile or any other merchant generator retail rates for self-supplied station power. It asserts that Niagara Mohawk's continuing attempt to bill retail rates to generators that self-supply station power, including AES's generating facility located in Somerset, New York, is expressly prohibited by Commission precedent. IPPNY, which represents a large number of generators that are self-supplying their station power requirements but are still being billed under so-called retail tariffs for station power service by Niagara Mohawk, asserts that an order granting the relief requested by Nine Mile is necessary to promote uniform, efficient and non-discriminatory station power supply practices in the emerging regional wholesale electricity markets. LIPA and Reliant similarly support the complaint

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LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

[14] NY Transmission Owners are comprised of Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp. (NYSEG), Rochester Gas and Electric Corp., and Orange and Rockland Utilities, Inc.

and urge the Commission to grant the relief requested in the complaint.

14. NY Transmission Owners and New York Commission believe that the Commission should deny the complaint because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and because Nine Mile has failed to establish that discrimination exists. They contend that the complaint effectively asks the Commission to declare that the state has no jurisdiction to regulate local delivery service to the Nine Mile facilities, and they argue that the Commission has no authority to define the limits of the state's jurisdiction over local delivery service. They assert that the FPA controls, and the statute leaves the regulation of local delivery service to the states. Moreover, they argue that both Commission precedent and, more importantly, Detroit Edison have already expressly recognized the state's ability to regulate local distribution/delivery service. Therefore, they conclude that the relief requested should be denied and the complaint dismissed.

15. Nine Mile filed a response to the arguments raised by the New York Commission and Niagara Mohawk. Niagara Mohawk subsequently filed an answer.

16. On December 5, 2003, Niagara Mohawk filed a motion to lodge a decision issued by the New York Commission on November 25, 2003, accepting revisions to its retail tariff SC-7. On December 12, 2003, the New York Commission also filed a motion to lodge that decision.

DISCUSSION

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notice of intervention and the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Nine Mile's response and Niagara Mohawk's subsequent answer and will, therefore, reject them. We will, however, grant Niagara Mohawk's and the New York Commission's motions to lodge the New York Commission's November 25 decision.

Station Power Cases

18. The recent line of station power cases began with a series of orders involving PJM. The Commission found in PJM II that station power may be provided to a generating facility in three ways: (1) on-site self-supply (from generation located "behind-the-meter"); (2) remote self-supply (from another generator owned by the same company); or (3) third-party supply.[15] The Commission ruled that "[f]or both on-site and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output" and thus "there is no sale (for end use or

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[15] PJM II, 94 FERC at 61,890.

otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."[16]

19. In the same order, the Commission considered a request by NRG that the Commission find that the provision of station power is subject to the Commission's jurisdiction as a wholesale transaction. The Commission found that, if NRG is self-supplying station power, Niagara Mohawk could not charge it for station power under a retail tariff; but, to the extent that NRG's facilities were "incapable of self-supplying station power under any circumstances (whether because of their particular configurations or otherwise), then NRG would appear to be ineligible for self-supplying."[17]

20. The Commission also entertained a request by NYSEG that the Commission disclaim jurisdiction over NYSEG's provision of station power as an unbundled retail sale of electricity. The Commission found in that regard that "all generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator."[18] However, the Commission determined that provision of station power to merchant generators under a

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[16] Id.

[17] Id. at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

[18] Id. at 61,892-93 (emphasis in original).

retail tariff, when the merchant generators have negative net output and cannot self-supply, would be appropriate.

21. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.[19] In KeySpan I, the Commission again emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction).[20] In KeySpan I, the Commission also distinguished between, on the one hand, the delivery of station power over local distribution lines and considered to be a retail service and, on the other hand, the delivery of station power over transmission (or wholesale distribution) lines and considered to be transmission service under the jurisdiction of the Commission.[21]

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[19] Midwest Generation, L.L.C. v. Commonwealth Edison Co., 99 FERC ¶ 61,166 (2002); KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 99 FERC ¶ 61,167 (2002) (KeySpan I), order on reh'g, 100 FERC ¶ 61,201 (2002); Sunbury Generation, L.L.C. v. PPL Electric Utilities Corp., 99 FERC ¶ 61,168 (2002) (Sunbury I), order on reh'g, 100 FERC ¶ 61,200 (2002); USGen New England, Inc., 99 FERC ¶ 61,169 (2002) (USGen), order on clarification, 100 FERC ¶ P61,199 (2002).

[20] See KeySpan I, 99 FERC at 61,679; accord Sunbury I, 99 FERC at 61,683.

[21] See KeySpan I, 99 FERC at 61,679-80; accord Sunbury I, 99 FERC at 61,683; USGen, 99 FERC at 61,686.

22. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power.[22] The proposal, which the Commission accepted, provided for monthly netting to determine whether a generator has self-supplied, in which case it will not pay transmission charges. If a generator remotely self-supplies or uses third-party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.[23]

23. The Commission also found that, "[t]o the extent that transmission facilities are involved [in the delivery of station power], such delivery service will be subject to NYISO's OATT. Any delivery of station power over local distribution facilities and the compensation for such delivery is a matter properly for the New York Commission and not for this Commission."[24] The Commission also found that NYISO's proposal to net station power on a monthly basis was reasonable, and it granted a request for clarification that "all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month . . . [A]ny energy that falls under the definition of station power must be netted against energy produced during the given month."[25]

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[22] See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,230 (2002), reh'g pending (KeySpan III).

[23] Id. at P 8, 23.

[24] Id. at P 20.

[25] Id. at P 24, 25.

24. In NU, Northeast Utilities complained that NRG was required by an Interconnection Agreement between them to pay retail rates for station power purchased from a Northeast Utilities affiliate. NRG argued that its generators were only connected to transmission facilities.[26] The Commission determined that "when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party."[27]

25. The Commission further stated that the Northeast Utilities affiliate "may impose state-approved charges regardless of who provides the energy, or whether a sale of energy occurs, or whether the delivery uses no identifiable distribution facilities."[28]

26. The Commission corrected that misstatement in Warrior Run, however, explaining that where there are no local distribution facilities involved in the delivery of station power, but only transmission facilities, the Commission has jurisdiction over the delivery and the rates for the delivery. The Commission noted that:

> language from NU reflects a misreading of Order Nos. 888 and 888-A, where we discussed local distribution service that would remain subject to state jurisdiction after unbundling - so that a state would be able to "assign stranded costs and benefits through a

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[26] Further, NRG contended that each of its subsidiaries could self-supply station power by netting energy consumed within each station against its output. The Commission held that the time period for netting should be that which is allowed by ISO-New England.

[27] 101 FERC ¶ 61,327 at P 25.

[28] Id. (emphasis added).

> local distribution service charge." We did not intend to suggest, as the dictum in NU implies, and as Allegheny Power argues, that the use (or, here, non-use) of local distribution facilities for delivery of station power is entirely irrelevant, no matter the circumstances, to whether a local distribution charge for delivery of station power can be assessed. Indeed, to accord Order Nos. 888 and 888-A such a reading results in rates that would be contrary to longstanding principles of cost causation. Allowing Allegheny Power to charge for retail distribution service in this circumstance would also frustrate Commission efforts to create a more level playing field with more comparable treatment between merchant generators and vertically integrated utilities.[29]

In Warrior Run, the Commission further found that no local distribution facilities were involved in the delivery of station power from the supplier, Allegheny Power, to the Warrior Run facility, and that the delivery was made only over transmission facilities. Thus, the Commission would have jurisdiction over the delivery of energy over transmission facilities, and any charge for distribution would be an impermissible double charge for transmission service.[30]

Tariff Provisions

27. The Commission has held that jurisdiction over the

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[29] Warrior Run, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

[30] Id. at P 16.

provision of station power depends on how it is supplied.[31] Nine Mile has a choice of suppliers and has chosen to self-supply station power and take delivery service under NYISO's Services Tariff. NYISO's Services Tariff determines whether a generator's net output is positive or negative, and thus the quantity of any transmission service utilized, on a monthly basis. When Nine Mile maintains a positive net output for every month, it self-supplies station power pursuant to NYISO's Services Tariff, and there is no sale of station power.[32] Moreover, as such delivery does not make use of any Niagara Mohawk local distribution facilities, there would be no delivery over and no charge for the use of Niagara Mohawk's local distribution facilities. Niagara Mohawk has no basis for requiring Nine Mile to buy or pay

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[31] E.g., PJM II, 94 FERC at 61,891.

[32] See id. at 61,890-92. Niagara Mohawk's SC-7 retail tariff determines station power demand based on 15-minute increments, while NYISO's Services Tariff does so monthly. Thus, in theory, a generator could accumulate significant station power charges if the charges were based on Niagara Mohawk's calculation, while, in contrast, maintaining monthly positive net output (and thus lower or no charges) as billed by NYISO. To the extent that there is any merit (and we believe there is not) to Niagara Mohawk's position that it must be able to recover under its retail tariff charges for energy delivered to Nine Mile's plants, there must be consistency between the amount of energy purchased and the quantity of transmission used. NYISO's Services Tariff must be controlling so that the wholesale and retail tariffs yield harmonious results so that customers are not over-billed and service providers are accurately compensated. Indeed, the recent New York Commission decision lodged by Niagara Mohawk expressly recognized the need to harmonize state and Federal regulations. See November 25 Decision at 14, 15.

for the delivery of station power under its retail tariff SC-7 when Nine Mile self-supplies.[33]

28. We do not believe that Detroit Edison requires a different result. Detroit Edison involved tariff provisions of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) that potentially allowed an unbundled retail customer to take distribution service under Midwest ISO's Open Access Transmission Tariff, and thus to avoid paying stranded cost charges assessed under a retail tariff. The court found that the Commission exceeded its statutory jurisdiction by accepting such tariff provisions. NYISO's netting provision does not provide for either transmission or distribution charges, however, but merely determines whether or not a generator has self-supplied station power and the quantity of delivery service - in this case, given that local distribution facilities are not used to provide such delivery service, Commission-jurisdictional transmission service - it takes and must pay for. Thus, Nine Mile's reliance on NYISO's netting provision is not contrary to Detroit Edison.

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[33] In this regard, the New York Commission made clear in its acceptance of Niagara Mohawk's revision to the SC-7 tariff that it was approving "state-jurisdictional charges for services provided under standby tariffs that are in addition to the charges for services furnished under station use tariffs," November 25 Decision at 12 (emphasis added). Thus, the New York Commission recognizes that the SC-7 tariff should only apply to those local distribution services which are actually provided by the local utility, and which could, in some situations, be made in tandem with FERC-jurisdictional charges for transmission service, but which cannot replace or duplicate such charges. Although Nine Mile does not anticipate any negative net output over any month, should that occur, it must compensate the supplier.

29. Contrary to Niagara Mohawk's assertion, Warrior Run did not merely clarify the rulings in NU. Rather, the Commission in Warrior Run explicitly reversed the misstatement that a transmission provider may impose charges based on the allocated cost of local distribution facilities even though no local distribution facilities are involved in the delivery of station power.[34] The Commission found there that "[s]ince the delivery apparently involves transmission facilities only, the Commission would have jurisdiction over the delivery and the rates for the delivery. In our view, a charge for distribution service levied by [the transmission provider] for the transmission of the station power over [its] transmission facilities would appear to be an impermissible double charge for transmission service."[35] Thus, there is no basis for Niagara Mohawk's position that it can impose local distribution rates when self-supplied station power is delivered over only Commission-jurisdictional facilities, as is the case with Nine Mile.

30. This result is consistent with policy considerations discussed in previous station power cases. In PJM II, the Commission noted that vertically-integrated utilities traditionally had treated station power as net or negative generation. The Commission determined that "[i]f a generating facility netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff, simply because the generating facility in question had changed

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[34] Warrior Run, 104 FERC ¶ 61,051 at P 17.

[35] Id. at P 16.

owners."[36] Further, allowing self-supplying merchant generators to net, as is permitted in New York, addresses the concerns of merchant generators that vertically-integrated utilities otherwise could favor their own or affiliated generating stations to the competitive disadvantage of the new owners of facilities that had been divested.

Interpretation of Order No. 888

31. Niagara Mohawk and the New York Commission have cited to Order No. 888 to support their allegation that the state can authorize charges to merchant generators for station power even when the generators have chosen to self-supply and utilize the netting provisions of the NYISO Services Tariff and even when the generators are receiving station power over only Commission-jurisdictional facilities. In a June 26, 2003 letter to the president of IPPNY, Niagara Mohawk's General Counsel asserts: "In our view, station power service retains an element of state-jurisdictional distribution delivery service. For that reason, we firmly believe that we are entitled to continue assessing state-jurisdictional charges for the distribution component of the service."[37]

32. As we have emphasized in our station power orders since PJM II, where a merchant generator is, in fact, using local distribution facilities owned by another for delivery of station power (as may be the case for third-party supply), it is the responsibility of the merchant generator to make appropriate

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[36] PJM II, 94 FERC at 61,894.

[37] See Complaint, Exhibit 1.

arrangements for such service.[38] However, as we explain in more detail below, Order No. 888 is not appropriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is not, in fact, using local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff. In short, the utility must actually be providing a service before it can levy charges.

33. It is particularly inappropriate for parties to rely on Order No. 888 to justify their attempts to prevent generators from using the netting provision of a Commission-jurisdictional tariff (such as the NYISO Services Tariff) on the grounds that this Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new owners of divested generation where no identifiable local distribution facilities are being used, as is the case with respect to Nine Mile's units. That is, when a merchant generator is not, in fact, using the local distribution facilities of another to receive station power (the case here), Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's jurisdiction (as is expressly provided for under the NYISO Services Tariff). This position is fully consistent with our previous station power orders. While this Commission cannot approve or disapprove a retail rate for standby service, it is within our purview to interpret and enforce the tariffs on file at the Commission, including the NYISO Services Tariff's netting

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[38] "The delivery of station power may also involve the usage of local distribution facilities; this aspect of the transaction may be subject to regulation by a state regulatory authority." PJM II, 94 FERC at 61,891 n.60 (emphasis added).

provision, and to interpret and enforce our own orders, such as Order No. 888.

34. The passage in question from Order No. 888 reads as follows:

> First, even when our technical test for local distribution facilities identifies no local distribution facilities for a specific transaction, we believe that states have authority over the service of delivering electric energy to end users. Second, through their jurisdiction over retail delivery services, states have authority not only to assess stranded costs but also to assess charges for stranded benefits, such as low-income assistance and demand-side management. Because their authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination of method they find appropriate. They do not have to assign them to specific facilities.
>
> Thus, while we believe that in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even when there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. Under this interpretation of state/federal jurisdiction, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus

avoid being assessed charges for stranded costs and benefits.[39]

35. First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to generation-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier.[40] However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

36. Second, the references in this passage to " no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local

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[39] Order No. 888 at 31,849 (footnotes omitted).

[40] See TAPS, 225 F.3d at 699; Order No. 888-A at 30,176, 30,350-51; accord Order No. 888 at 31,637, 31,790, 31,798, 31,849. As we explained in Order No. 888, if power customers leave their utilities' systems to reach other power suppliers without paying a share of prudently-incurred generation costs, the generation costs incurred to serve those customers will become stranded unless they can be recovered from other customers. Order No. 888 at 31,785; accord Order No. 888-A at 30,349, 30,350-51.

distribution facilities (which typically are lower voltage facilities[41]) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator,[42] and rates to that merchant generator are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[43]

37. In short, Order No. 888 is not authority for Niagara Mohawk's position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk's local distribution facilities and no local distribution service is actually provided.

Niagara Mohawk Compliance with NYISO Obligations

38. Nine Mile contends that Niagara Mohawk also has

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[41] Order No. 888 at 31,771, 31,780, 31,783.

[42] See, e.g., Niagara Mohawk Holdings, Inc., 95 FERC ¶ 61,381 at 62,412 n.13, reh'g denied, 96 FERC ¶ 61,144 (2001); Niagara Mohawk Power Corporation, 95 FERC ¶ 61,165 (2001).

[43] Order No. 888 at 31,845-46.

refused to comply with its obligations under the NYISO tariff provisions to make available certain metering data and other information required by NYISO for billing purposes. Specifically, Nine Mile states that Niagara Mohawk has not accepted all of the delivery points associated with Nine Mile's accounts in a manner that enables self-supply under the NYISO Services Tariff. According to Nine Mile, this is contrary to Niagara Mohawk's obligations under Section 2.05 of the ISO/Transmission Owner's Agreement.[44] Niagara Mohawk does not address these allegations in its Answer.

39. It is clear that Niagara Mohawk must provide certain data to NYISO that will assist NYISO in administering the station power provisions of its Services Tariff. Niagara Mohawk has offered no explanation or justification for its actions in this regard, and we will direct it to comply with its obligations under NYISO tariff provisions and to coordinate with NYISO in providing any required data. We will direct Niagara Mohawk to file a report no later than 30 days after the issuance of this order detailing the steps it has taken to comply with these requirements.

The Commission orders:

(A) Nine Mile's complaint is hereby granted and Nine Mile may be charged only in accordance with NYISO's Services Tariff, as discussed in the body of this order.

(B) Niagara Mohawk is hereby directed to comply with its obligations to provide NYISO any data needed for NYISO's administration of its station power provisions pursuant to the NYISO Services Tariff.

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[44] See Complaint at 3.

(C) Niagara Mohawk is hereby directed to submit a report describing its actions taken in compliance with Ordering Paragraph (B), no later than 30 days after the issuance of this order.

By the Commission.

(SEAL)

Linda Mitry,
Acting Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-234-001

[Filed January 21, 2005]

Nine Mile Point Nuclear Station, LLC	)
	)
v.	)
	)
Niagara Mohawk Power Corporation	)
	)

ORDER DENYING REHEARING

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly

1. On December 23, 2003, the Commission issued an order in this docket[1] granting a complaint filed by Nine Mile Point Nuclear Station, LLC (Nine Mile), which alleged that Niagara Mohawk Power Corporation (Niagara Mohawk) had improperly refused to implement the station power provisions of the New York Independent System Operator, Inc. (NYISO)

[1] Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp., 105 FERC ¶ 61,336 (2003) (December 23 Order).

Market Administration and Control Area Services Tariff (Services Tariff). This order denies rehearing. This action benefits customers by resolving disputes over station power-related services and ensuring that wholesale merchant generators may obtain least-cost station power for the ultimate benefit of the customers they serve.

Background

2. On September 26, 2003, Nine Mile filed a complaint pursuant to section 206 of the Federal Power Act (FPA), alleging that Niagara Mohawk had interfered with Nine Mile's ability to obtain station power service under the NYISO Services Tariff. The December 23 Order granted Nine Mile's complaint and directed Niagara Mohawk to take actions in conformance with the findings in the order.

3. Nine Mile stated that it had purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000, that it had operated the two units at the station since that time, and that it had received station power service[2] under Niagara Mohawk's retail tariff SC-7.[3] Nine Mile stated that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the

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[2] Nine Mile uses the definition of station power found in NYISO's Market Administration and Control Area Services Tariff (Services Tariff). *See* New York Independent System Operator, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 67A, Section 2.172c.

[3] P.S.C. No. 207 Electricity, Service Classification No. 7 (Sale of Standby Service to Customer With On-Site Generation Facilities).

provisions of NYISO's Services Tariff.[4] Nine Mile explained that it expected each generating unit to experience positive net output over the monthly netting period provided under the NYISO Services Tariff, and, to the extent a unit experienced a prolonged outage, it intended to self-supply that unit's station power remotely from power generated by the sister unit. According to Nine Mile, the output of each unit is delivered using only transmission facilities.[5] Nine Mile concluded that, under Commission precedent, it would be entirely self-sufficient with respect to station power and contended that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged.

4. Nine Mile asserted that Niagara Mohawk did not respond to Nine Mile's notice of termination, but rather continued to assess retail charges on Nine Mile. Nine Mile further charged that Niagara Mohawk failed to assist NYISO in the administration of its station power rules by providing NYISO with meter information needed for accurate administration of the NYISO settlement process, and that NYISO consequently

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[4] NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24. NYISO's Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (*i.e.*, remote self-supply).

[5] Nine Mile noted that one of Niagara Mohawk's accounts appears to be served at a voltage lower than transmission level and stated that, to the extent that account is self-supplied through the use of local distribution facilities, it would pay for the use of those facilities consistent with the NYISO tariff and Commission precedent. Complaint at 2, n.4.

was unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power.

5. Nine Mile requested that the Commission direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile's accounts were net positive for each month, through either on-site or remote self-supply of station power, and direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power.

6. In response, Niagara Mohawk stated that, since July 1, 2002, it had provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Niagara Mohawk countered that the Commission and the courts have held that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the Commission found in Order No. 888,[6] that recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no

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[6] *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission facilities.[7] Niagara Mohawk concluded that Order No. 888's statement that states have jurisdiction in all circumstances over the service of delivering energy to end users included circumstances involving no "sale" of energy from one party to another.

7. In the December 23 Order, the Commission granted Nine Mile's complaint. The Commission found that Nine Mile chose to self-supply station power and take delivery under NYISO's Services Tariff, which determines whether a generator's net output is positive or negative on a monthly basis. The Commission noted that Nine Mile had maintained a net positive output every month and thus had self-supplied station power, pursuant to NYISO's Services Tariff. The Commission further found that, as the delivery of station power did not make use of any Niagara Mohawk local distribution facilities, there was no delivery over Niagara Mohawk's local distribution facilities. Thus, the Commission concluded that Niagara Mohawk had no basis for requiring Nine Mile to buy or pay for the delivery of station power under its retail tariff. The Commission distinguished the instant case from *Detroit Edison* and held that the result is

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[7] Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." *Id.* The references to "usage" and "demand" indicate that the Commission anticipated that utilities would be providing some quantifiable service. However, as we explain below, in this instance, Niagara Mohawk is not providing any service on which payment for stranded costs can attach.

consistent with policy considerations discussed in previous station power cases.

8. The Commission ruled that Order No. 888 did not justify the imposition of any delivery charges other than transmission charges subject to the Commission's jurisdiction. The Commission explained that Order No. 888 does not authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates in the case of a merchant generator where that generator is not, in fact, using local distribution facilities. Further, the Commission stated:

> By the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to generation-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.[8]

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[8] December 23 Order at P 35 (footnote omitted) (emphasis in original).

9. In the December 23 Order, the Commission directed Niagara Mohawk to comply with its obligations under NYISO's Services Tariff to provide certain metering data and other information required for billing purposes. Niagara Mohawk reported on its compliance with this directive on February 6, 2004, and the Commission accepted the report by letter order dated March 22, 2004.

Requests For Rehearing

10. Niagara Mohawk filed a request for rehearing jointly with certain New York Transmission Owners (referred to herein as Niagara Mohawk or Joint Request for convenience).[9] The New York Transmission Owners (NYTOs) also filed a supplemental application for rehearing (without Niagara Mohawk) seeking rehearing of a number of issues in addition to those raised in the Joint Request. Requests for rehearing were also filed by the New York Public Service Commission (New York Commission) and Northeast Utilities Service Company (NUSCO).

11. These parties contend, in brief, that the Commission exceeded its jurisdiction by allegedly not recognizing that states have jurisdiction over the local delivery of energy to end-users and by asserting the authority to approve tariff provisions that determine the charges applicable to the service of the local delivery of electricity to end-users. They also allege that the Commission reversed prior determinations that

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[9] These New York Transmission Owners are Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corp. The New York Transmission Owners seek rehearing individually and collectively.

states have jurisdiction to regulate charges to end-users and failed to provide an explanation for such reversal.

12. On January 30, 2004, Detroit Edison Company (Detroit Edison) filed a motion to intervene out of time stating that it may be directly affected by any Commission order that impacts its ability to assess charges under its state-jurisdictional retail electric tariff and thus that it has a direct and substantial interest in the Commission's decision in this proceeding. Detroit Edison argues that good cause exists to permit it to intervene out-of-time because it only recently became aware of the December 23 Order and the Commission's purported "establishment of a new set of jurisdictional rules regarding retail energy sales."[10] Detroit Edison asserts that its intervention raises no new issues and submits no new factual information but simply supports arguments and positions asserted by Niagara Mohawk and other parties. Detroit Edison states that it agrees to accept the record as it exists.

13. On February 17, 2004, Nine Mile filed an answer to Detroit Edison's motion to intervene out of time, contending that the motion should be rejected as procedurally flawed. Nine Mile argues that Detroit Edison has not met the requirements for intervention out of time because there is no reason that Detroit Edison should have just become aware of the Nine Mile complaint and because granting the intervention now will disrupt the proceeding, placing additional burdens on existing parties. Moreover, Nine Mile asserts that Detroit Edison's pleading is in essence a request for rehearing, and the Commission cannot accept a petition for rehearing outside the thirty day period provided in the FPA. Nine Mile also

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[10] Motion at 3.

responds to Detroit Edison's arguments on substantive grounds.

Discussion

Procedural Matters

14. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention. Detroit Edison has not met its burden of justifying late intervention. Accordingly, we will deny Detroit Edison's motion to intervene and reject its comments. As a result, we need not address the arguments raised in Nine Mile's answer.

15. NYTOs and the New York Commission raise issues related to the netting provisions of the NYISO Services Tariff[11] that constitute a collateral attack on the orders accepting those provisions,[12] and such issues are beyond the scope of this proceeding. In addition, NUSCO seeks clarification of the December 23 Order's impact on the *NU* order.[13] The issues that NUSCO raise do not share a factual basis with those presented in the instant complaint, and

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[11] *See* NYTOs request for rehearing at 13-22; New York Commission request for rehearing at 14-16.

[12] *KeySpan-Ravenswood, Inc., v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*).

[13] *See* NUSCO request for rehearing at 4, 6-12.

NUSCO's concerns are beyond the scope of this proceeding. Accordingly, we need not address those issues here.

Summary

16. We will deny rehearing. At the heart of this case is the fact that Niagara Mohawk is seeking to charge Nine Mile for services that Nine Mile does not want and that Niagara Mohawk is not providing. Nine Mile seeks an alternative source of station power under a wholesale tariff. This Commission has the authority to enforce its tariffs and to find that, where there is a conflict between a retail tariff and a wholesale tariff, the latter must prevail. These findings affect the retail tariff only to the extent that there is a conflict. Moreover, the Commission is not reversing or changing its holdings in Order No. 888 but is applying the requirements of that order to the facts of the dispute before it. Our action here does not permit merchant generators to bypass retail stranded costs and benefits charges for periods during which they actually purchase station power from a utility or have station power delivered over the local distribution facilities of that utility. Our action here does not constitute a reversal of, and in fact our rulings regarding station power are entirely consistent with, Order No. 888. The findings in the December 23 Order are the logical continuation of the analysis in our long line of station power cases, where we have held that jurisdiction over the provision of station power depends on how it is supplied, and that merchant generators may not be required to buy station power under a retail tariff.[14]

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[14] *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,891-93 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2003) (*PJM III*).

Interplay of Federal and State Jurisdiction

17. On rehearing, Niagara Mohawk and others acknowledge that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service (to both wholesale and end-use customers), and claim that the states have jurisdiction over both sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to these parties, any sale of and/or delivery of station power to Nine Mile is subject to the jurisdiction of the New York Commission, and this Commission may not regulate the transaction. These parties claim that the December 23 Order allows end-users to bypass state jurisdiction by obtaining local delivery service under a Commission-jurisdictional transmission tariff, *i.e.*, the NYISO Services Tariff, thus impermissibly intruding upon state jurisdiction. Even for the quantities of station power that Nine Mile self-supplies, Niagara Mohawk contends that Nine Mile is a retail end-use customer that should take local delivery service under Niagara Mohawk's retail tariff.

18. The New York Commission contends that, while this Commission has jurisdiction to decide what is a wholesale sale, there is no such sale present in station use, and once that is decided, we lack the authority "to intrude upon a state's exercise of jurisdiction over the energy consumed in a retail sale."[15] The New York Commission reasons that, because energy is being consumed, it is being purchased and used at retail.[16] It relies on a Commission order -- which, we note,

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[15] New York Commission at 5.

[16] The New York Commission also relies on a provision of the New York Public Service Law for the idea that a retail sale results

was subsequently reversed in pertinent part -- for the proposition that there is a retail sale when a transmission-level generator purchases its station use energy from an independent third party,[17] and then asserts that netting against generation produced at a remote location is a third-party retail purchase, even when the cost is accounted for through netting. Then, the New York Commission seeks to distinguish *Warrior Run* by stating that the service Nine Mile receives from Niagara Mohawk is a retail energy service and not a distribution service. The New York Commission concludes that *Warrior Run* is irrelevant because it does not cure the Commission's lack of jurisdiction over retail energy services.

19. Several parties also state that the Commission has been overruled by *Detroit Edison Co. v. FERC*[18] in its earlier attempt to provide for the retail sale of energy through a Commission-jurisdictional tariff. They assert that the distinction the Commission drew in the December 23 Order[19]

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whenever there is a delivery of electricity from a remote location. *See id.* at 6-7 & n.5. On the contrary, the cited provision defines the term "electric corporation," rather than defining "retail sale."

[17] New York Commission at 7, *citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*.

[18] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

[19] *See* December 23 Order at P 28 (explaining that *Detroit Edison* involved tariff provisions that potentially allowed an unbundled retail customer to take distribution service over Midwest ISO's OATT, while NYISO's netting provision does not provide for either transmission or distribution charges but only determines

with respect to *Detroit Edison* is not persuasive because "the Commission lacks jurisdiction over retail energy sales to transmission-level customers to the same extent as it lacks that jurisdiction over retail energy sales to distribution-level customers."[20] Niagara Mohawk and NYTOs argue that, although the NYISO tariff provision at issue is different from the tariff provision in *Detroit Edison*, the impact is the same, and the Commission is prohibited from establishing terms and conditions applicable to state-jurisdictional service.

20. NYTOs contend that the Commission suggested in the December 23 Order that its jurisdiction rests upon the type of charge at issue, or the type of customer receiving the service. NYTOs assert that there is no basis for these distinctions.

21. Niagara Mohawk points out that the New York Commission determined that generators receiving station power must pay their allocated share of the delivering utility's retail stranded costs. It states that permitting customers such as Nine Mile to elude paying charges for delivery service under the retail tariff will cause a significant increase in the rates for customers who cannot take service under the federal tariff and financial instability for utilities that can no longer collect stranded cost charges from customers such as Nine Mile.

22. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs

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whether or not a generator has self-supplied).

[20] New York Commission at 9.

were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations Nine Mile is a retail delivery customer, even though it is not purchasing energy from Niagara Mohawk, and argues that the Commission's findings in the December 23 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC*[21] for the principle that "courts apply a 'presumption against preemption" when displacement of actual, existing state regulation would result" and that "'the historic police powers of the State were not to be superceded . . . unless that was the clear and manifest purpose of Congress.'"[22] Finally, Niagara Mohawk contends that Congress intended in the FPA to withhold from the Commission the authority to override State jurisdiction over local distribution of electricity or local rates.

Commission Response

23. We note initially that the position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the December 23 Order is a collateral attack on findings that the Commission made in earlier station power cases and is a collateral attack being made by the same parties that were active in those earlier proceedings. The same is true for the allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the

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[21] 535 U.S. 1, 18 (2002).

[22] Niagara Mohawk at 9, *citing New York v. FERC*, 535 U.S. at 18.

station power practices of NYSEG and Niagara Mohawk in New York State. The New York Commission, Niagara Mohawk and other individual Transmission Owners were active parties in *PJM II* and *PJM III*, while the Transmission Owners jointly were active parties in *PJM IV*. As discussed in *KeySpan IV*,[23] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[24] Nevertheless, we reiterate here that, although an off-line generator may consume energy as station power load, it is a separate question whether that consumed energy has been sold at retail. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

24. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[25] That does not mean the Commission is approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

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[23] 107 FERC ¶ 61,142 at P 20-22.

[24] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

[25] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*).

25. Niagara Mohawk's retail tariff (SC-7) impairs the ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[26] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

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[26] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 43.

26. What the Commission has done in the December 23 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of services (wholesale or retail) are actually being provided and to act accordingly. As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of negative generation, which we discussed at length in *PJM II* and *PJM III*.[27] The netting provisions determine the net output of a wholesale merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must control.[28] This is not an

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[27] As we noted in *PJM II* (at 61,886 and 61,892), integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested generating facilities, they likewise would not be charged for station power.

[28] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a

impermissible encroachment on the New York Commission's authority over retail rates.

27. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers[29] and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below. Further, utilities are free to seek, and states are free to approve, offsetting adjustments in other rates or to request that the recovery period be extended.

28. Niagara Mohawk claims that there is " no basis" for the December 23rd Order's "assumption" that the same monthly netting interval must apply both to the calculation of station power requirements under the NYISO's tariff and under Niagara Mohawk's tariff SC-7. In support of its argument, Niagara Mohawk states the NYISO Services Tariff uses one month for calculating net output (which determines whether station power has been self-supplied or not), but simultaneously applies an hourly-based congestion management system to withdrawals and injections of station power energy.

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retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction).

[29] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004).

29. Niagara Mohawk is incorrect. It is irrelevant that congestion management is an hourly-based system while station power requirements are calculated monthly; they measure two different things, and thus their different time periods do not conflict. Indeed, if a generator supplies all of its station power requirements on site, the congestion management system is not applied, because the generator has not withdrawn or injected any station power energy into or from the grid. In contrast, having two different time periods in the NYISO Services Tariff and in SC-7 to measure the same thing B station power requirements B does create a conflict. This conflict can, and does, operate to prevent a generator from using the NYISO's station power procurement and delivery rules at all. We illustrated this conflict and how it is to be resolved in *KeySpan IV*.[30]

30. NYTOs claim that the Commission erred in the December 23 Order by finding that no local distribution facilities are involved in providing service to Nine Mile. NYTOs state that this is a matter within the New York Commission's purview, and that the retail end-use meter being utilized, as well as the books, records and rate schedules of the local utility, are sufficient assets to invoke state jurisdiction. We disagree that it is solely the states that may make determinations about the nature of these facilities. This Commission must be able to assess whether facilities are transmission or local distribution facilities and thus whether they are subject to our jurisdiction.[31] Our authority to make this determination is not

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[30] 107 FERC ¶ 61,142 at P 43.

[31] *See, e.g., New York v. FERC*, 535 U.S. 1, 22-23 (2002) (noting that the Commission does not have jurisdiction over local distribution, but was within its authority to determine which

dependent on the ultimate outcome of the determination. In the December 23 Order, the Commission found, based on the record evidence, that the facilities used to serve Nine Mile were solely transmission facilities. NYTOs cite no evidence to the contrary in their request for rehearing. The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.

31. Regarding *Warrior Run*, we note that the parties themselves cannot agree as to the nature of the service available under Niagara Mohawk's retail tariff. Niagara Mohawk characterizes its retail tariff as recovering just delivery charges.[32] According to the New York Commission, however, Niagara Mohawk provides only retail energy service. To the extent that delivery service is being provided, *Warrior Run* makes clear that this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities. To the extent Niagara Mohawk claims that it is providing retail energy service, Nine Mile's self-supply of station power means that there is no sale by Niagara Mohawk to Nine Mile, and thus no service being

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facilities are local distribution facilities); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964) (finding that "[w]hether facilities are used in local distribution . . . involves a question of fact to be decided by the FPC as an original matter"); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417-19, 1421 (10th Cir. 1992) (finding that the Commission, in determining the scope of its jurisdiction in an analogous context, had the power to determine that a transaction was not local distribution, and that, where delivery occurred over interstate gas pipelines but a retail sale was "conspicuously missing," the state had no jurisdiction).

[32] *See* Niagara Mohawk's Answer at 1-3 (October 20, 2003).

provided by Niagara Mohawk to Nine Mile.

32. We continue to believe that *Detroit Edison* is distinguishable from the facts of this case. The jurisdictional question there was whether local distribution service was being provided under MISO's transmission tariff, which would enable an unbundled retail customer to bypass retail tariffs. Here, in contrast, Nine Mile is not taking any state-jurisdictional, local distribution service from Niagara Mohawk.[33] Nor, for that matter, is it taking any local distribution service from NYISO. Indeed, no local distribution service is purported to be provided under NYISO's Services Tariff. Thus, we are not allowing Nine Mile to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that Nine Mile is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.

33. Lastly, we note the New York Commission's new argument raised on rehearing that Niagara Mohawk is providing reliability-based services[34] to the Nine Mile facility

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[33] We have consistently emphasized since *PJM II*, 94 FERC ¶ 61,251 at n.60, that any local distribution service must be paid for under a retail tariff.

[34] To the extent that the New York Commission (at 10-11) asserts that station power is needed for generating facilities to restart their generators, it is confusing restoration or blackstart service with station power service, *see PJM III*, 94 FERC at 61,896, and, in any event, the former is a wholesale, not a retail, service. *See* Order No. 888 at 31,711-12.

and is provi[illegible] meter-reading and billing services associated with retail sa[illegible] made to the Nine Mile facility. Other than these unsupported assertions, the New York Commission provides no evidence that Niagara Mohawk is, in fact, providing these services under the retail tariff in question. Certainly, as a transmission-owning member of the NYISO, Niagara Mohawk contributes to system reliability. But Niagara Mohawk is compensated in full for those contributions through the transmission and ancillary services rates it collects via the NYISO Open Access Transmission Tariff (OATT). Even if we were to concede (which we do not) that station power delivered solely over local distribution facilities plays a role in system reliability, again, there is no evidence that Niagara Mohawk has ever sold or delivered over local distribution facilities station power to the Nine Mile facility since Nine Mile sought to terminate service under the retail tariff. Finally, given that we have found that the Nine Mile facility has self-supplied its station power requirements in full for all months in question, we disagree with the New York Commission's contention that Niagara Mohawk has performed any meter-reading or billing services for the Nine Mile facility.

Consistency with Precedent

34. In the December 23 Order, the Commission responded to arguments that Order No. 888 could be read to authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator even where the utility is not providing a service over local distribution facilities. The Commission explained that it was not departing from its rationale in Order No. 888:

> First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring

to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

Second, the references in this passage to " no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator, and rates to

> that merchant generator are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[35]

35. On rehearing, the parties state that the Commission failed to provide a sound explanation for reversing Order No. 888. NYTOs claim that the Commission in the December 23 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, thus overstepping its jurisdictional authority. Niagara Mohawk argues that the December 23 Order is flatly inconsistent with Order No. 888's holding that "'even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users.'"[36]

36. NUSCO claims that the Commission reversed Order No. 888's ruling that there is always an element of local distribution service in any delivery of power to an end user, stating that Order No. 888 does not indicate that a utility must be providing a service in order for state jurisdiction to attach. NUSCO further contends that the December 23 Order does not explain why there is an element of local distribution service where power is delivered over transmission facilities to a customer other than a merchant generator but that there is not an element of local distribution service when the same

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[35] December 23 Order at P 35-36 (footnotes omitted).

[36] Niagara Mohawk at 17, *citing* Order No. 888 at 31,849.

service is provided to a merchant generator. According to NUSCO, the voltage level at which an end use customer receives its delivery service is unrelated to whether the customer caused generation stranded costs, and thus should pay stranded costs imposed by a state authority. NUSCO contends that there is no difference between a merchant generator and any other end use customer respecting whether they could cause stranded costs, and it is the prerogative of a state to determine who should pay stranded costs. Finally, NUSCO states that even if states are found to have no authority to assess stranded cost and benefit charges as part of local distribution charges, they will still be able to impose these charges based on their authority to regulate the end use consumption of power. If it is the Commission's intention to eliminate all state jurisdiction over end use self-supply, then NUSCO seeks rehearing.

37. The New York Commission contends that the Commission's effort to distinguish station power use from the other holdings in Order No. 888 is irrational because a utility that has divested its generation is in even greater need of recovering its stranded costs. It also asserts that the premise upon which Order No. 888 was based, that customers leaving their utility systems will cause generation costs to become stranded, is exactly what the Commission is allowing merchant generators to do; "it will enable them to leave Niagara Mohawk's system, obtain their generation from someone else, and potentially force Niagara Mohawk's other ratepayers to bear those stranded costs."[37]

38. Niagara Mohawk argues that the rules articulated in the December 23 Order are inconsistent with the Commission's

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[37] New York Commission at 14.

prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized the existence of local delivery service as a basis of state jurisdiction separate from the use of distribution facilities.[38] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the December 23 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the December 23 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the December 23 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

39. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[39] It notes that Order No. 888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local

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[38] Niagara Mohawk at 17, *quoting* Order No. 888 at 21,650: "The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users."

[39] *Detroit Edison Co.*, 95 FERC ¶ 61,415, *reh'g denied*, 96 FERC ¶ 61,309 (2001); *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

distribution facilities" to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure that customers should not be able to bypass state tariffs.

Commission Response

40. In the December 23 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was not previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned wholesale" customers considered in Order No. 888. And, where in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

41. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided,

however, and a merchant generator is self-supplying its station power requirements in accordance with NYISO's Services Tariff, and any delivery service is transmission service, the charges specified in NYISO's tariffs apply to the exclusion of any retail tariff. This is, as well, consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs by utilities with whom they compete for load, thus encouraging competition in electricity products.

42. NYTOs state that they understood Order No. 888 to provide that there is always local delivery service involved in service to end-use customers, that states have exclusive jurisdiction over local delivery service, and that states may impose non-bypassable distribution or retail stranded cost charges. They allege that the Commission's finding that the delivery of station power cannot take place where no local distribution facilities have been used violates the terms under which they agreed to turn over operation of their transmission facilities to NYISO.

43. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[40] we also have not interfered with or prevented stranded cost

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[40] 107 FERC ¶ 61,142 at P 49.

recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

44. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a small subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates given that they are not taking a retail service.[41] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.

45. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like Nine Mile were not retail customers of Niagara Mohawk or the other Transmission Owners. Therefore, they are not "retail-turned-wholesale" customers. The prior owners of the generating facilities were the incumbent utilities, not the merchant generators. In

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[41] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g.*, *Warrior Run*, 104 FERC ¶ 61,051 at P 17; *accord* December 23 Order at P 37. In other words, Order No. 888 is consistent with traditional cost-causation principles.

addition, the NYISO Services Tariff expressly excludes large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 discusses), so they cannot self-supply nor terminate service under retail tariffs. These entities will be paying stranded costs.

46. Similarly, regarding NUSCO's contentions, we never held that there is an element of local distribution service where power is being delivered to a customer other than a merchant generator, while there is no such service present with respect to power being delivered to merchant generators. This construction is a misstatement of our order. As we discuss above, merchant generators are not retail-turned-wholesale customers; they did not have a prior relationship with a utility supplier. Any difference between the treatment of merchant generators and others arises because merchant generators never left utilities' systems and so did not cause the stranded costs sought to be recovered under retail tariffs. NUSCO completely overlooks these facts.

47. Finally, as discussed in *KeySpan IV*,[42] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question that the New York

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[42] *KeySpan IV*, 107 FERC ¶ 61,142 at P 52.

Commission poses, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[43] the question of whether a particular merchant generator actually is using local distribution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York, such as Nine Mile, is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Nature of Standby Service

48. Niagara Mohawk responds to the finding in the December 23 Order that no service is being provided by asserting that customers taking service under its SC-7 rates received unbundled standby service, "*i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity . . . in the event that [Nine Mile] needs to buy such energy . . ."[44] NYTOs assert on rehearing that the Commission incorrectly assumed that the retail standby service offered in Niagara Mohawk's SC-7 tariff requires an actual delivery. According to NYTOs, the very nature of standby service requires that the utility stand ready to deliver station power service; since Nine Mile has the potential to take such service, NYTOs argue that the Commission's finding that no service was being provided is incorrect. Moreover, they claim that the absence of any sale of energy does not negate the fact that Niagara Mohawk has incurred

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[43] *See PJM III*, 95 FERC at 62,186.

[44] Niagara Mohawk at 22.

costs that are allocable to SC-7 customers for standing ready to provide delivery services.

49. The New York Commission argues that station power service is a retail energy service.[45] On the contrary, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, i.e., the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that [Nine Mile] needs to buy such energy B for example, if both its units go off-line or for some other reason cannot supply each other with station power." Yet, elsewhere, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[46]

Commission Response

50. The parties assert for the first time on rehearing that Niagara Mohawk is, in fact, providing a capacity-based service, standby service, that is distinct from either retail energy sales or energy delivery. There is no indication that this assertion could not have been made in their original pleadings. Absent a showing of good cause, the Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier. As we recently observed, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for

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[45] New York Commission at 10.

[46] Niagara Mohawk at 9.

parties seeking a final administrative decision."[47] The Commission has the discretion to reject such arguments. Nevertheless, we will address the issue in this instance in order to clarify the record.

51. We note that the New York Commission argues that station power service is a retail energy service.[48] However, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[49] Yet, elsewhere, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that [Nine Mile] needs to buy such energy B for example, if both its units go off-line or for some other reason cannot supply each other with station power."[50] NYTOs characterize the service provided by Niagara Mohawk as "retail station service, or standby station service" and state that the New York Commission requires each local franchise utility to stand ready to deliver local station service.[51] The fact that the parties cannot agree on the nature of the service purportedly being provided to Nine Mile

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[47] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,024 at P 6; *see also Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota)*, 64 FERC ¶ 61,172 at 62,522 (1993).

[48] New York Commission at 10.

[49] Niagara Mohawk at 9.

[50] *Id.* at 22.

[51] NYTOs at 8.

lends credence to the Commission's position that no service is actually being provided. Further, Niagara Mohawk's new stance can be taken as its concession that there must, indeed, be a service provided to Nine Mile in order for Niagara Mohawk to assess charges.

52. Nevertheless, this discussion does not change the fact that Nine Mile does not want any service under Niagara Mohawk's SC-7 tariff, standby or otherwise. It terminated service effective as of September 17, 2003 in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff. Nor has Niagara Mohawk actually provided service for which it may charge since that date. NYTOs argue that the absence of any sale of energy does not change the fact that Niagara Mohawk incurred costs that are allocable to SC-7 customers for standing ready to provide delivery service to them. Because Nine Mile chose to terminate its service agreement with Niagara Mohawk under SC-7, however, Niagara Mohawk is under no contractual obligation to stand ready to provide station service to Nine Mile. Niagara Mohawk has not provided any evidence that it has provided such service nor evidence with respect to any costs associated with standing ready.

53. As we commented in the December 23 Order, we cannot approve or disapprove a retail rate for standby service; however, it is within our purview to interpret and enforce the tariffs on file here at this Commission, including the netting provision of NYISO's Services Tariff. To the extent a retail tariff for standby service, or any other service, conflicts with NYISO's netting provision, the latter must control. If forcing Nine Mile to pay for retail standby service undercuts the NYISO netting provision or causes a generator to pay duplicative charges, then the federally-regulated tariff

preempts the state-regulated tariff.

Discrimination

54. The New York Commission asserts that part of the Commission's rationale in granting Nine Mile's complaint was that charging Nine Mile for station power service would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants. The New York Commission contends that the arrangements in place before Niagara Mohawk divested its plants have no bearing on the present circumstances. It attests that Niagara Mohawk has now divested all of its generation, and all formerly vertically integrated utilities in New York also have or are in the process of doing so, unlike in PJM. According to the New York Commission, there thus could be no discrimination against non-utility owned generation facilities in New York. The New York Commission further attempts to distinguish the facts by noting that, when New York's utilities were integrated, they recovered station power costs in their bundled retail charges to their customers; "[t]hey did not suggest that their generators failed to consume energy for station use when out-of-service, and in fact did charge their ratepayers for the standby services that generators consumed."[52] Thus, it argues, no discrimination has occurred.

55. Niagara Mohawk notes that differences have arisen due to market restructuring that affect the comparability of the treatment of station power service before and after divestiture, asserting that there is nothing discriminatory about utilities adapting their business practices to the new market rules and new commercial environment. It concludes that a change in

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[52] *Id.* at 16.

Commission rules over time does not produce discrimination, and in fact believes that the December 23 Order results in unfair discrimination between generators and other industrial customers.

56. To the extent the New York Commission challenges findings in our orders approving NYISO's netting provisions, this is a collateral attack on our orders in the *KeySpan* proceeding, and we will not allow relitigation of our station power precedent. To the extent that we may have relied on the specter of discrimination in our December 23 Order, we reiterate our statement in *KeySpan IV* that the potential for discrimination between utilities and merchant generators in New York State still exists. We explained:

> Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs . . .. The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent

> utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.

KeySpan IV, 107 FERC ¶ 61,142 at P 66 (footnotes omitted).

57. In the instant proceeding, we are similarly permitting merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets.

Other Issues

58. NYTOs characterize the use of a 30-day monthly netting period as a "fiction" and "accounting convention" that the Commission is improperly using as a "dividing line" between state and federal jurisdiction. They contend that "the delivery of energy for consumption at power stations is a retail transaction subject to exclusive state jurisdiction."[53] We disagree.

59. First, to the extent that NYTOs are arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction, they are engaging in a collateral attack on our earlier *PJM* orders. As we last explained in *KeySpan IV*,[54] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output

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[53] NYTOs at 11-12.

[54] *KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

of a particular generating facility net of station power requirements, rather than as gross output. We will not revisit this issue here.

60. Second, NYTOs are incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "in the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would have jurisdiction over such transmission."[55] Significantly, we also emphasized that:

> [I]n a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (*not* as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as re-bundled simply because one supplier is involved.[56]

61. NYTOs also cite to *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*CLP*), contending that "the jurisdictional test of [FPA] Section 201(b) is 'an engineering and scientific, rather than a legalistic or governmental, test.'" This case does not support NYTOs' contention that this Commission lacks jurisdiction over the delivery of station power. As we explained in our discussion of *CLP* in

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[55] *PJM II*, 94 FERC at 61,889 n. 51. We also noted that where such delivery also involved the use of local distribution facilities, the state would regulate that aspect of the transaction. *Id.* at n.61.

[56] *Id.* at n.61.

Appendix G (legal analysis) of Order No. 888,[57] the Supreme Court noted in dictum in that case that once this Commission has jurisdiction over a public utility, the fact that there is also local regulation does not preclude exercise of our regulatory functions.[58] We also noted that, while the local distribution proviso of section 201(b) of the FPA must be given effect, the Supreme Court in *CLP* and other cases[59] has stated that whether facilities are used in local distribution is a question of fact to be decided by this Commission as an original matter.[60]

The Commission orders:

The Commission hereby denies the requests for rehearing of the December 23 Order.

By the Commission.

(SEAL)

Linda Mitry,
Deputy Secretary.

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[57] Order No. 888 at 31,974.

[58] *CLP*, 324 U.S. at 533.

[59] *E.g.*, *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964).

[60] Order No. 888 at 31,980.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227

[Filed April 10, 2006]

NIAGARA MOHAWK POWER CORPORATION, Petitioners,	)
v.	)
FEDERAL ENERGY REGULATORY COMMISSION, Respondents.	)

Monday, April 10, 2006
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE: CIRCUIT JUDGE GRIFFITH AND SENIOR CIRCUIT JUDGES EDWARDS AND SILBERMAN

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PROCEEDINGS

THE CLERK: Case number 04-1227, Niagra Mohawk Power Corporation (indiscernible).

JUDGE SILBERMAN: Have you settled this thing?

MR. FARRAH: No, Your Honor.

JUDGE SILBERMAN: Want to go back outside and --

JUDGE GRIFFITH: Want us to give you a few minutes?

JUDGE SILBERMAN: -- finish this off, please?

MR. FARRAH: After all these years I think we'd miss it.

ORAL ARGUMENT OF ELIAS G. FARRAH, ESQ.

ON BEHALF OF THE PETITIONER

MR. FARRAH: If it please the Court, this case involves FERC's unlawful attempt to regulate the retail sales of station power and related local distribution service through the use of an accounting fiction. However, FERC's own concessions in this case demonstrate that its orders must be reversed and remanded.

First, FERC accepts repeatedly the notion that because station power is used for consumption it is is an end use and therefore a sale of station power is a retail sale subject to the exclusive jurisdiction of the State. There's no question about that.

JUDGE SILBERMAN: You said FERC has conceded this?

MR. FARRAH: Yes.

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JUDGE SILBERMAN: Isn't that strange. I didn't see any such concession in their brief.

MR. FARRAH: Well, Your Honor, you can take --

JUDGE SILBERMAN: I mean, that sounds like a gross overstatement, counsel.

JUDGE EDWARDS: All station power is used?

MR. FARRAH: Any sale of station power would be a retail sale. If you find a sale.

JUDGE SILBERMAN: Yes, if my aunt had wheels she'd be a trolley car. FERC is saying there's no sale.

MR. FARRAH: That's correct. FERC is saying that there is no sale, Your Honor. And that's one of the issues that we're going to get to here, but the fact is, if you find the sale, FERC concedes that that's a retail sale subject to the State's exclusive jurisdiction and that's an important point. And I'll come back to that.

FERC also --

JUDGE EDWARDS: I'm not sure about that either.

MR. FARRAH: For this point I would refer you to JA 98, JA 148 to 149 and JA 539. Those are the places in FERC's orders where they made that concession.

FERC also admits that the NYISO is providing generators station power on an hourly basis and charging for it on an hourly basis. FERC also recognizes that power taken from the NYISO comes from other suppliers in the NYISO market who must

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be paid hourly. The NYISO doesn't have any power of it's own. It runs an auction. It purchases power from suppliers, provides it to the bidders who are looking for the power, figures out what the price is and does the billing. So that power came from --

JUDGE SILBERMAN: May I ask you a question at the outset, dealing with the procedural issues as to whether your, we're jurisdictionally barred from your argument or not. Let's see if I understand correctly, and this is, I think I'm sympathetic to your position here, your view is in the *PJM* case, although the, it may well be that FERC established and you were prepared and you are accepting the notion that some kind of netting is appropriate but your view is that in *PJM* or in the other New York case whose name I've forgotten for a moment, there's never been a clear holding that a one month netting is appropriate and your view is a one month netting, de facto, eliminates retail jurisdiction? And so therefore, you're entitled to challenge the one month netting as having an impact on the entire jurisdictional terrain?

MR. FARRAH: That's absolutely right, Your Honor. It wasn't until they determined that for New York we had to go

to a one month netting that we were injured and had to appeal. There were other things that occurred in our case that were not even present in the *PJM* case and so those issues are (indiscernible).

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JUDGE SILBERMAN: I just want to make sure that I've eliminated the underbrush here. You have no objection to the one hour netting?

MR. FARRAH: No, we were, in fact, proposing that, Your Honor.

JUDGE SILBERMAN: Right.

MR. FARRAH: And FERC said repeatedly that there was no one appropriate or reasonable period for netting. There could be any number of periods that would be reasonable.

JUDGE SILBERMAN: All right, now here's a more difficult question for you so that I, there's a flag that goes up now. If you're conceding, as you have, that a one hour netting is appropriate, haven't you given away the principle in this case from your point of view? Since it's inevitably true that even with a one hour netting, you're going to have some possibility of station power retail sales under your definition?

MR. FARRAH: Well, there are possibilities of retail sales, you know, under FERC's entire scenario.

JUDGE SILBERMAN: No. No. No.

JUDGE EDWARDS: No, this is an important question. I'm very curious to hear your answer to this too because it seems

to me you just conceded the main argument in this case.

MR. FARRAH: Well, I think, from our perspective, and this, I think the State has to weigh in on this because if

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it is a sale, the State would have a determination to determine the period over which it should be measured, I guess is the more correct answer. It's my understanding --

JUDGE GRIFFITH: Do you want to reverse your initial answer?

MR. FARRAH: Yes. I think it's my --

JUDGE GRIFFITH: You did concede an hour was appropriate?

JUDGE SILBERMAN: So, if an hour is appropriate, doesn't that establish the principle because within that hour, you could clearly have a situation in which you have a station, a generator, a merchant generator quiet for 45 minutes, or excuse me, pulling off power for 45 minutes, right? And then, surging power on in the last 15?

MR. FARRAH: Sure.

JUDGE EDWARDS: So (indiscernible) positive or negative situation.

MR. FARRAH: Sure.

JUDGE EDWARDS: Within the hour?

MR. FARRAH: The --

JUDGE SILBERMAN: I'm sorry. I didn't hear Judge Edwards.

JUDGE EDWARDS: Within the hour you could have, what you're saying, positive or negative, within the hour?

MR. FARRAH: Yes, there is always a netting period.

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JUDGE EDWARDS: Right.

MR. FARRAH: In other words, it all centers around the measurement period, whether you're using 15 minutes, 30 minutes, an hour.

JUDGE EDWARDS: But what we're asking you is haven't you cleaned out a big piece of the case in the fight and that was just whether or not it should be a month or an hour?

MR. FARRAH: No, I think --

JUDGE EDWARDS: Well, then we don't understand.

MR. FARRAH: -- I'd like to --

JUDGE EDWARDS: I don't understand how you --

MR. FARRAH: I think I would like to correct my earlier statement by saying that if there's a sale, if you find a sale, then it's a retail sale and the State is the appropriate party for determining over what period of time that should be measured.

JUDGE SILBERMAN: I think the problem is you did in fact, although I agree with you, that you're entitled to challenge everything at this point, the one thing the *PJM* and the *KeySpan* established is netting is appropriate and that seems to me the accepted terrain of this case.

MR. FARRAH: Well netting, it's not a question of netting as I just said. There's always netting because you have to measure on some time period and whatever time period you pick for measuring, anything that happens within the hour,

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or within the measurement period gets netted. So it's not a question of whether there should be netting. It's a question --

JUDGE SILBERMAN: And we're talking about netting for purposes of transmissions costs, right? As well as the delivery?

MR. FARRAH: Yes, I think what --

JUDGE SILBERMAN: And transmission is strictly within FERC's jurisdiction?

MR. FARRAH: Transmission is within FERC's jurisdiction, that's correct, Your Honor. However, FERC does not have authority to transmit directly to end users unless the State has voluntarily opened up --

JUDGE SILBERMAN: Wait a minute. FERC doesn't have authority to transmit or FERC doesn't transmit (indiscernible) --

MR. FARRAH: Authorized transmission directly to end

users under 212(h) of the Federal Power Act unless the State has opened up, if you take a look at page 49 of our initial brief, we have a quote from FERC in order 888 --

JUDGE SILBERMAN: Well, now let's get back to the merchant generator being an end user.

MR. FARRAH: Yes, there's no question that if there's a sale it's an end user.

JUDGE SILBERMAN: Well, but that's the big

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assumption because it's clear that FERC would agree that if the merchant generator buys the power from a third party there is a sale and the transmission charges are to be allocated.

MR. FARRAH: Well, actually what FERC agrees, because of part 4 of the tariff, okay, and that gets to a point I was making earlier, because FERC recognized in 888 that it could not authorize transmission through an end user unless the State had voluntarily opened up its system, you know, opened access or retail access as it's called.

JUDGE SILBERMAN: One of the arguments you make is in 888, FERC concluded that there's always a delivery charge to the end user. Whether or not the new or the new big user uses delivery, local delivery. In other words, even if the local, even if the big end user bypasses the transmission of the old utility, there's, nevertheless, an element of what that big guy takes is going to be a local delivery charge and the reason for that is unless we stick em they're able to abandon the stranded cost. That's correct, isn't it?

MR. FARRAH: If you're not able to charge them they'll avoid all costs.

JUDGE SILBERMAN: But the concern particularly is the stranded cost. Because if I was a utility for many years, selling to this behemoth, Judge Griffith, who was taking this enormous amount of energy and all of a sudden now he decides he's going to buy from a merchant generator and eliminate me

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all together, I'm stuck with all the stranded costs of all the transmission set up, so FERC says, nevertheless, despite the fact that he claims he is not using my service, we're going to stick him anyway. That's what 888 says, right?

MR. FARRAH: That's what 888 says. What 888 says is that it's up to the State to determine how stranded cost will be allocated.

JUDGE SILBERMAN: But FERC says they can do it?

MR. FARRAH: FERC said they could do it, yes.

JUDGE SILBERMAN: Okay. So FERC relied on a (indiscernible) did it not, because behemoth Griffith is not using my power? Excuse me, not my transmission lines, but FERC relied on a (indiscernible), did it not?

MR. FARRAH: No, I think what the FERC --

JUDGE SILBERMAN: And we affirmed the fiction?

MR. FARRAH: I wouldn't quite call it a fiction.

JUDGE SILBERMAN: The fiction was that he was using retail delivery service. He wasn't.

MR. FARRAH: Well, what FERC said was for purposes of restructuring under 888, we know that there's a difference.

JUDGE SILBERMAN: We're going to deem him to use the local delivery service, even though he doesn't use it.

MR. FARRAH: What, yes, essentially what --

JUDGE SILBERMAN: That's fair. Isn't that fair?

MR. FARRAH: Essentially what they said --

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JUDGE SILBERMAN: And you're claiming, that dammit, FERC having said that once ought to stick with that here.

MR. FARRAH: Well, certainly having made that determination and encouraged or incented the electric utilities in the state of New York and the government of the state of New York to restructure the entire industry and to create the New York ISO based on those representations yes, I think we have a right to expect that it would honor the findings that it made in 888.

JUDGE SILBERMAN: It wasn't a finding, it was a conclusion. Now FERC comes up and says we don't want to extend that here because, and now we're talking about merchant generators who are not like big end users. They're competitors in the market so we don't want to extend that notion. So they're cutting back on the fiction, right?

MR. FARRAH: What they're doing, they are not technically claiming that they're changing 888. They claim that they are sticking with it.

JUDGE SILBERMAN: They're interpreting 888 and they're cutting back on their fiction.

MR. FARRAH: They're saying that we're interpreting 888 to mean that there was an exception from the universe that covers that statement, that when they said there's always an element of local distribution service in any delivery to an end user, we didn't mean all. We meant that there was this

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little exception for generators that bought assets from utilities and that with respect to them --

JUDGE SILBERMAN: So they explained it. They explained it. They explained why they cut back on their language. Is there anything wrong with an agency doing that?

MR. FARRAH: Yes, there is, Your Honor.

JUDGE SILBERMAN: What?

MR. FARRAH: The courts have said, this Court has said that if you're going to depart from a generic rule, which 888 was, the very first thing you have to do is admit that you're departing from it and you have to --

JUDGE SILBERMAN: Or explain why it doesn't apply.

MR. FARRAH: And then you have to explain --

JUDGE SILBERMAN: There is no question in 888 they never focused on the merchant generator, did they?

MR. FARRAH: I don't think that's the case. There's many instances that --

JUDGE SILBERMAN: What do you mean that's not the case?

MR. FARRAH: There are many instances --

JUDGE SILBERMAN: Did they focus on a merchant generator?

MR. FARRAH: In 888 there was many, there was discussion about generating assets and the divestiture of generating assets and how those (indiscernible).

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JUDGE SILBERMAN: Right but it didn't focus on the merchant generator as an end user.

MR. FARRAH: That's the point, Your Honor, that they did not say, when they made the statement that all deliveries to an end user, okay, embody a local delivery service subject to the State's jurisdiction, they did not say that the generators we just talked about and the assets that we were just talking about are somehow excluded.

JUDGE SILBERMAN: But they did say that in *PJM*.

MR. FARRAH: No, they didn't. Actually, Your Honor, what they did, that was in 1996. And then in May 15th of, June ist of 2001, in *PJM* what they said was *PJM II* was not

intended to and does not in any way modify a reverse or do 888's jurisdictional findings including our discussion of state jurisdiction over local distribution service nor does it create any new legal requirements with respect to transmission service, including unbundled retail transmission service.

JUDGE SILBERMAN: Right, but they did say one hour. They did say the one hour netting.

MR. FARRAH: Yes, but on this point as to whether they were changing what they said in 888 --

JUDGE SILBERMAN: No, no. It's not a question of changing. They were interpreting. And these two, these series of cases they were interpreting. There was nothing inconsistent in 888. They raised a general principle and then

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they cut back on that principle in this case. Courts do that all the time.

MR. FARRAH: But the point, Your Honor, is that in *PJM* and the *KeySpan* cases and in related case in *Northeast Utilities* where the exact facts came up where there were no distribution facilities, FERC said the State could still charge them and they quoted from their statements in 888.

JUDGE SILBERMAN: If there's a sale.

MR. FARRAH: They later said, they later came back, no, they later came back and said we were wrong. So in July 10th of 2003, they issued the *AES Warrior Run* case saying now, nine years later, that we were wrong. If there are no identifiable distribution facilities involved in the case of these

merchant generators the State does not have jurisdiction. Now, I would submit, Your Honor, that if they intended that from day one, back in 1996 and if they intended that when they issued their *PJM* orders and if they intended that when they issued the *KeySpan* orders in this case, and if they intended that when they issued the *Northeast Utilities* case, it is absolutely incredible that they were unaware that this exception existed. It's clearly a post hawk interpretation that's inconsistent with the face of 888.

JUDGE SILBERMAN: Well, that happens with agencies and as well as with courts. You see facts different. Now, let me go to another question with respect to competition.

[p. 16]

You make the point that New York's market, as compared to Pennsylvania, New Jersey, and Maryland is really different because 95 percent of the utilities have divested the generator aspects of their business which was not true in *PJM*. Is that correct?

MR. FARRAH: Correct.

JUDGE SILBERMAN: And your concern is that FERC doesn't take that into account. FERC says, number 1, well even if only five percent are continuing to have their own generators that presents a competitive problem. They also suggest a potential competitive problem in terms of the way the utilities would be able to purchase their energy but then they make a very interesting point where there is a clear competitive problem. There is a clear competitive problem between the merchant generator in New York and the merchant generator in Pennsylvania, Maryland, and New Jersey, isn't there?

MR. FARRAH: I would not necessarily agree with that, Your Honor.

JUDGE SILBERMAN: Well, now if merchant generator in New York has to pay these millions of dollars of retail charges for station power and a merchant generator in Pennsylvania, New Jersey, and Maryland does not and are selling into a market which exceeds the State jurisdiction, the whole mid-Atlantic area, then the New York generators are

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at a real competitive disadvantage, vis a vis, Pennsylvania, Maryland and New Jersey, isn't that correct?

MR. FARRAH: I disagree, Your Honor. I think it depends on the facts in the three regions. If you'll let me explain, and I think for that very reason --

JUDGE SILBERMAN: Well, assuming all other facts are the same.

MR. FARRAH: Well, FERC has not reached that conclusion, Your Honor, because --

JUDGE SILBERMAN: Yes, they did.

MR. FARRAH: No, they don't.

JUDGE SILBERMAN: They did say it in this case.

MR. FARRAH: No, they didn't. They said that having the same, when *KeySpan* went in and asked FERC that very question, we want you to force New York to have the one month so it would be the same as *PJM* and that will help the

region, FERC said no. The NYISO, in fact, opposed it along with us.

JUDGE SILBERMAN: No. No. No, right. FERC did not require it. They left it up to NYISO to make its own judgement. NYISO makes its judgement but it's in part based, but FERC approves it based on this ground.

MR. FARRAH: They did, Your Honor, but for example, New England, they've approved a different hourly method in New England so --

JUDGE SILBERMAN: I don't know what the competitive,

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whether the merchant generators in New England can sell in to New York as easily as Pennsylvania can or whether New York can sell as easily in New England as it can in Pennsylvania.

MR. FARRAH: Well, Your Honor, the FERC realized that the selling of the plants would reduce any concern about discrimination and what I'd like to point out is that the U.S. Supreme Court in *FPC v Conway* said that when FERC is concerned about discrimination they can use those concerns in terms of the interplay of state and federal jurisdictional activities in designing their own services and their own tariffs but does not give them the authority to interfere with what's going on at the State. The State has its own statutes governing undue discrimination and the State, you're going to hear from them, the lengths they've gone to to tailor these state tariffs to the individual circumstances of the generators but the States apply their tariffs on a nondiscriminatory basis to everyone.

So there is no discrimination going on there with regard to the New York State tariffs.

The other point, Your Honor, the reason why the answer to your first question a moment ago, was don't they have to be the same or be at a disadvantage the answer is no, because --

JUDGE SILBERMAN: It wasn't that they don't have to be the same. Was it reasonable for FERC to conclude that that was a legitimate reason.

MR. FARRAH: Well, the question was was it

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reasonable to conclude that it needs to be the same to eliminate discrimination or unfair competition.

JUDGE SILBERMAN: That FERC would use as part of its reason for approving the ISO tariff, that merchant generators in New York would be able to assume the same costs as merchant generators in Pennsylvania, New Jersey, and Maryland.

MR. FARRAH: And Your Honor, I don't think it would be reasonable to make the assumption that the netting policy has to be the same in all three places and in fact, that's why FERC didn't rule that way.

JUDGE SILBERMAN: You keep using have to. The question is whether it's reasonable.

JUDGE EDWARDS: Reasonable.

MR. FARRAH: It's not reasonable to make the assumption that that's necessary because --

JUDGE SILBERMAN: Wait a minute, it's not a question of necessary. The question is whether it's helpful.

MR. FARRAH: I don't believe it is. I don't believe that that fact alone, you're making, that statement that it's reasonable is based on an assumption that's unsupported because these generators in all three regions are buying plants. Okay? When they buy these plants, they go through an auction and they bid on the plants based upon the circumstances they know are going to exist afterwards. Okay? And they take all of those into consideration in what they pay

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for the plant. So if they knew that they were going to be subject to station power costs and took that into account in how they priced their bid for the plant, then they're not necessarily disadvantaged against anybody else. Whether or not they're at a competitive disadvantage would depend upon --

JUDGE EDWARDS: Counsel, let me ask you a question. I think we've got your answer on this. I want to make sure I understand your starting point. Let's say you have a merchant generator, you're assuming one hour is permissible netting, self-supplying from a remote generator remains positive for the hour. Is there a sale?

MR. FARRAH: If the --

JUDGE EDWARDS: Don't change, please don't.

MR. FARRAH: Okay.

JUDGE EDWARDS: Leave my hypothetical exactly the way I gave it to you. Don't add one single thing. Just answer my question. Sale or not? One hour netting, remain positive during the whole hour, self supplying from a remote generator.

JUDGE SILBERMAN: I assume you mean a remote generator owned by the same?

JUDGE EDWARDS: Owned by the same.

MR. FARRAH: That's what I wanted. Thank you, Your Honor.

JUDGE EDWARDS: Owned by the same.

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MR. FARRAH: Yes. In that situation we're not contesting that situation that that would be a --

JUDGE EDWARDS: That's not a sale.

MR. FARRAH: That's not a sale. We're not contesting the fact, well, let me just make sure --

JUDGE EDWARDS: No. No. No. That's all I wanted to know and that's what I said in the beginning. You've essentially conceded the hardest part of the case away. Because the fight then is whether they're arbitrary and capricious in using a month as opposed to an hour but most of the case is gone. That's what I thought you said in the beginning.

MR. FARRAH: No, I don't think that's correct, Your Honor.

JUDGE EDWARDS: It's not a sale there. It can't be a sale with a month if a month is reasonable. It's just what's a reasonable netting period? That's all.

MR. FARRAH: Your Honor --

JUDGE EDWARDS: It's all we're talking about and I wanted to make sure I got you right on that and now I have it.

MR. FARRAH: Your Honor, if I can just add the FERC measures sales on an hourly basis, okay? And the problem is that the FERC is not requiring just that the generator get power from its remote generator. It can take power out of the ISO grid regardless of whether it has a remote generator at

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all, and in fact, most cases they don't. So they're getting power from other suppliers, not their own remote supplier and to call that self-supply --

JUDGE EDWARDS: Well, I understand your point about that. That's not my question. We can ask them about that. I understand your point about that.

JUDGE SILBERMAN: Well, in fact, you're perfectly happy to have it be self supply under your hypothetical of it's an hour.

MR. FARRAH: Your Honor, if it's a sale, if you find that it's a (indiscernible) --

JUDGE EDWARDS: (Indiscernible) no, no, no. You just, fortunately we have a recording so it's there. I mean you answered the question and it's exactly, that's what I thought you said starting out. That's why Judge Silberman and I reacted the same way.

JUDGE SILBERMAN: (Indiscernible).

JUDGE EDWARDS: This case just became measurably easier.

MR. FARRAH: Well, I have to speak for my clients which are the utility petitioners and they have no problem with the hour but the State, who has the legal authority to regulate that retail sale and determine the measurement period may feel differently.

JUDGE SILBERMAN: The State conceded it too.

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JUDGE EDWARDS: Right. Sure they are. That's all I have.

MR. FARRAH: And if I could just point out a couple absurd results under the FERC's policy that I think you might want to ask them about? Under FERC's policy --

JUDGE GRIFFITH: I think your time is up, counsel. I think it's Ms. Dean's time.

JUDGE SILBERMAN: On your rebuttal you can come up with the absurd, it's always easy to find something FERC's absurd about.

MR. FARRAH: No argument there, Your Honor.

JUDGE GRIFFITH: I believe we have Ms. Dean, the New York Public Service Commission? You have five minutes, Ms. Dean.

MS. DEAN: Thank you.

ORAL ARGUMENT OF DIANE T. DEAN, ESQ.

ON BEHALF OF THE PETITIONER

MS. DEAN: I won't be saving any time for rebuttal. I'm going to, at the risk of confusing everything. I'm going to start with Judge Edward's question first in terms of the question of remote self supply.

The Public Service Commission, in essence, is fine if this Court finds that a retail sale does not occur as long as the service of local distribution is recognized even with the remote self supply. The fact of the matter is most of these

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generators have not rewired, have not disconnected from the utilities by whom they were owned right after divestiture and therefore the use of local distribution facilities are in fact being used either by virtue of FERC order 888's conclusion that there is an element of local distribution in every transaction, or in the alternative, if in fact, a fact finding is held and the seven factor test is applied to these facilities to make that determination which FERC has not done and the PFC has not done. These are thousands of miles of facilities and to actually make those findings in fact would be, at the risk of over exaggerating, an administrative nightmare.

JUDGE SILBERMAN: Wait a minute, counsel, where in your brief are you making this argument? I don't even see this.

MS. DEAN: Which, that local distribution facilities?

JUDGE SILBERMAN: No --

MS. DEAN: That we don't care about the retail sale?

JUDGE SILBERMAN: No, the last five minutes. Last two minutes. What are you referring to?

JUDGE EDWARDS: Are you arguing that they're all de facto local distribution?

MS. DEAN: No. No. What we argued in our brief is that FERC order 888 stated that every (indiscernible)

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transaction, retail transaction, includes some element of a local distribution.

JUDGE SILBERMAN: Which is a fiction, right?

MS. DEAN: It's not necessarily a fiction. But --

JUDGE SILBERMAN: I love it. Of course it's a fiction. Go back to my hypothetical. If I was the utility supplying power to --

MS. DEAN: AES Summerset.

JUDGE SILBERMAN: To what?

MS. DEAN: AES Summerset?

JUDGE SILBERMAN: Whatever.

MS. DEAN: The generator --

JUDGE SILBERMAN: Well, let's say General Motors. And General Motors has decided they don't need the power from the utilities any more. They can buy it on the spot market and so forth. We can still stick, FERC says you can still stick them with retail delivery charges because otherwise the stranded cost that the utility had developed over years, they would be stuck with. General Motors argued but we're not using that service anymore. FERC said it didn't matter. You're stuck anyway. We affirmed it. It was a fiction. It was a fiction because General Motors wasn't using the service but they were being charged for it anyway because otherwise the stranded cost problem wouldn't, a sky rocket that charges for the individual consumer. Isn't that correct?

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MS. DEAN: Okay.

JUDGE SILBERMAN: So now they're saying, look, in 888 we said this fiction but we were really concerned about General Motors. We weren't concerned about a merchant generator who comes into the market. That's not an end user.

MS. DEAN: Okay. I think that you're right in that FERC order 888 did not, it envisioned divestiture. It said FERC can't divest but it certainly left it up to the states to order divestiture. The PSC arranged for a divestiture through settlements, however, in divesting 95 percent of the generation of New York, New York State has taken probably

one of the most aggressive approaches to implementing FERC order 888 and competition in the electric industry. As a result of that divestiture --

JUDGE SILBERMAN: But you have five percent of --

MS. DEAN: We do.

JUDGE SILBERMAN: -- the utilities operating their own generators.

MS. DEAN: Yes, Your Honor, and just, you know, those are very small peaker plants. There are some NIPO plants. Yes, it really is (indiscernible) --

JUDGE SILBERMAN: What you started out saying, Judge Edwards, I'm going to respond to your hypothetical and --

MS. DEAN: I didn't? I'm sorry.

JUDGE SILBERMAN: No. Well, if you did I missed it.

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MS. DEAN: Okay.

JUDGE SILBERMAN: And (indiscernible).

MS. DEAN: Okay, I think your question was would you concede that a remote self supply is not a sale?

JUDGE SILBERMAN: Right.

MS. DEAN: If it's owned by the --

JUDGE SILBERMAN: Right.

MS. DEAN: -- one generator and we would say an hour.

JUDGE SILBERMAN: (Indiscernible.)

JUDGE EDWARDS: For an hour.

JUDGE GRIFFITH: For an hour.

MS. DEAN: For one hour.

JUDGE SILBERMAN: Right, they remain positive in the hour.

MS. DEAN: Yes.

JUDGE SILBERMAN: Okay.

MS. DEAN: And the PFC would say we would agree that the commodity is not a sale.

JUDGE SILBERMAN: Right.

MS. DEAN: If it's the same entity owning both generators. However, to the extent that local distribution facilities are being used, that's State jurisdictional and the State should have jurisdiction there.

JUDGE SILBERMAN: Well, doesn't the FERC order say

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that if it's provided by local distribution then it is a sale?

MS. DEAN: Yes. And that gets us to the one month netting because FERC also concludes that if you apply one month netting then if at the end of the month there's a net positive output then surprise, no local distribution has occurred during the course of, of that month at all.

JUDGE SILBERMAN: But that's the same thing that was true on the hour, right?

JUDGE EDWARDS: Right.

MS. DEAN: It is.

JUDGE EDWARDS: Right.

MS. DEAN: And the PFC's trying to harmonize this --

JUDGE EDWARDS: No, but it doesn't matter.

MS. DEAN: -- minute by minute accounting.

JUDGE EDWARDS: But it doesn't matter if you're using netting that's the whole point. It doesn't matter how it's coming in or out to make the determination of sale. It's about the netting.

MS. DEAN: The netting is --

JUDGE EDWARDS: It's just a different time period and I understand that different sides are advantaged depending upon the time period. I'm not naive about that but nonetheless as a principle matter I don't see any difference. You're inputting and outputting the same thing, an hour, a month, or two weeks, right?

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MS. DEAN: Right.

JUDGE EDWARDS: Then I don't get it.

MS. DEAN: That's the commodities, but that's solely for the commodity, the energy itself.

JUDGE EDWARDS: Right.

MS. DEAN: And because of unbundling you have to look at the commodity which the PFC has conceded and that netting is an acceptable way to account for the commodity.

JUDGE EDWARDS: Right.

MS. DEAN: But that you can't ignore the fact that power has to get there somehow.

JUDGE EDWARDS: Right.

MS. DEAN: And that's where local distribution services --

JUDGE EDWARDS: But within the one hour you don't care whether it's local distribution.

MS. DEAN: And that's a policy determination, Your Honor.

JUDGE EDWARDS: Well, that's the whole point.

MS. DEAN: Yes.

JUDGE EDWARDS: As a principle matter it doesn't make any sense. Because if you don't care in an hour then you can't care in a month either except that you can argue for other reasons that it's irrational to pick a month as opposed to an hour. But it has to be for other reasons. Not because

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it includes local distribution because local distribution is included in the hour.

MS. DEAN: It is, however, an hour in the PFC's opinion recognizes more reasonably the fluctuations which FERC says in its decisions, it wants to recognize. One month does not recognize fluctuations.

JUDGE EDWARDS: I understand. See, where Judge Silberman and I started out initial with the very first statement that your cooperating counsel is making, because it seemed to concede away a huge fight. Because netting is the proxy for determining sale. That's the way I've always understood this. He confirmed it. And you're saying the same thing. It's just a proxy here to figure out when there is not. Now I understand your big fight over well it's okay to do an hour, maybe two hours but not a month but for other reasons. That's what you all have conceded. It has to do with a different argument. You can't say well but there's local distribution. There's local distribution in an hour or two or at least the possibility of it.

MS. DEAN: Yes, there is.

JUDGE EDWARDS: Okay.

MS. DEAN: And I think that at some point administrative agencies including the PFC has to make policy decisions about what is reasonable in the market. The PFC does not want to hamstring the wholesale generators and burden

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them with superfluous costs. We want competition to work too and so that's why it comes down to a decision.

JUDGE SILBERMAN: But it is true from a jurisdictional point of view, if it involved, we're talking about transmission costs.

JUDGE EDWARDS: Right.

JUDGE SILBERMAN: Largely and that's under FERC's jurisdiction.

JUDGE EDWARDS: FERC's.

MS. DEAN: Yes, Your Honor, *New York v. FERC*.

JUDGE EDWARDS: Right.

MS. DEAN: May I just --

JUDGE GRIFFITH: Counsel, your time's up.

MS. DEAN: I would just like to conclude that --

JUDGE GRIFFITH: You have concluded. You can't (indiscernible).

MS. DEAN: Okay. All right. Thank you.

JUDGE GRIFFITH: Thank you very much.

ORAL ARGUMENT OF ROBERT H. SOLOMON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SOLOMON:May it please the Court, Robert Solomon.

JUDGE SILBERMAN: (Indiscernible) raise that. Why is it that we can't teach people how to raise the --

JUDGE EDWARDS: It's hard. They didn't get that in

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law school.

MR. SOLOMON:It's as high as it goes.

JUDGE SILBERMAN: It is?

JUDGE EDWARDS: Is that as high as it goes? Then you're too tall to argue.

JUDGE SILBERMAN: There it goes.

JUDGE EDWARDS: That's a compelling argument.

MR. SOLOMON: As high as it goes. Judge Silberman, Judge Edwards, I agree with both of you that the only issue left in this case is whether a one month period is a reasonable netting period.

JUDGE SILBERMAN: But you notice we phrased it differently then you did in your brief because you argue that

they were estopped from even arguing that jurisdictional issues were relevant because they'd been decided in *PJM* and in *KeySpan*. I think that's an overstatement but our view is that they did de facto, at least, concede that netting was appropriate and once they conceded the netting was appropriate and they didn't challenge that then, and it's true in this case anyway, they concede in this case then you get back to the issue as to whether one month is reasonable as compared to an hour.

MR. SOLOMON: Yes, I agree, whether the issue is raised as a jurisdictional issue or whether the issue is raised as a substantive merits issue. In either event, the

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issue is whether a monthly netting period is a reasonable netting period. Your Honor is correct. Conceptually there's no difference between netting over 30 days and netting over 30 minutes. I understand that the petitioners concede that some netting period is appropriate. Judge Edwards is correct that you need to have some type of netting period as a proxy for determining whether a sale, whether a service has been undertaken. But if you allow netting over one hour, within that one hour, of course, there may be times, there may be minutes in which the merchant generator is not operating and may need electricity to heat, to light, to operate all of its facilities.

JUDGE SILBERMAN: Even to start the generator.

MR. SOLOMON: Even to start the generator. Judge Edwards asked whether the situation of remote self supply, where that particular unit might be out but other units that are owned by

the same company are net positive, that indeed, is a sale. That is a sale, excuse me, that is not a sale --

JUDGE EDWARDS: Was going to say the case really got complicated again.

MR. SOLOMON:I do not --

JUDGE EDWARDS: Just want you to know we're paying attention.

MR. SOLOMON:I do not want to complicate the case. This is something that the commission determined from the

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outset at the earliest of the *PJM* cases, there is no sale in that context. The New York Public Service Commission is focusing on local distribution, what the commission said in those early cases and has consistently reiterated is that there may be local distribution. The Commission has not definitively determined that when you have that type of remote self supply that there is no local distribution. That becomes a case specific decision. Indeed, in *KeySpan II* there was a rehearing from the first *KeySpan* order concerning whether in fact, the merchant generator is taking service over local distribution. That is a matter that was set for hearing but it was a matter that was ultimately settled away. If there is a factual dispute, if there is an issue, whether in fact service is being provided over local distribution or local transmission, that is a case specific matter which the Commission has not decided. The Commission has not intruded upon the State's.

JUDGE EDWARDS: Let me ask you something just so I make sure I'm understanding something. I thought I did but

I'm not sure. If the merchant generator is in a negative position for the prescribed period whether it be a month, an hour, two weeks, the payment is to whom for what?

MR. SOLOMON: The payment is always to --

JUDGE EDWARDS: It's a sale, during the negative position?

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MR. SOLOMON: It is, of course, not a sale unless netted over the period of time --

JUDGE EDWARDS: That's what I said.

MR. SOLOMON: -- that unit is in the negative.

JUDGE EDWARDS: Over the period of time it's a negative position.

MR. SOLOMON: Yes.

JUDGE EDWARDS: That's a sale.

MR. SOLOMON: Yes.

JUDGE EDWARDS: From whom to whom and who gets paid for what?

MR. SOLOMON: The payment is to the New York ISO. The New York ISO is the intermediary. The ISO doesn't take title and the ISO doesn't sale but the ISO does provide for basic settlement of accounts --

JUDGE SILBERMAN: That's because the ISO has provided transmission services.

JUDGE EDWARDS: Transmission, that's what I'm trying --

JUDGE SILBERMAN: Is that correct?

JUDGE EDWARDS: I want to make sure I'm understanding this.

MR. SOLOMON: That is correct.

JUDGE SILBERMAN: Now, to help Judge Edwards --

JUDGE EDWARDS: And he needs help on this one.

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JUDGE SILBERMAN: We all do. The biggest argument that petitioners make as to why a one month period is unreasonable, it's inconsistent with the hourly basis which the actual power is paid for. There are three elements, if I understand it correctly, in a potential purchase or you know, sale. One of which would be the actual power. Two would be the transmission. And three would be local delivery. Is that correct?

MR. SOLOMON: That's correct.

JUDGE SILBERMAN: Okay. Now, with respect, if I'm a merchant generator, and following Judge Edward's hypothetical, I need to pull power off the grid to start my generator, to turn the lights on, put my fax on, et cetera, I have to pay for that power to the grid on an hourly basis?

MR. SOLOMON: Yes.

JUDGE SILBERMAN: But, nevertheless, your position is for purposes of transmission, there is no sale. Now, what the devil's happened with respect to the hourly if it's not a sale? I mean the power?

MR. SOLOMON: The ISO operates the transmission grid and administers an open access transmission tariff. So the rates, terms and conditions --

JUDGE SILBERMAN: Counsel, are you answering the --

MR. SOLOMON: Yes, Your Honor.

JUDGE SILBERMAN: -- Judge Edward's question and my

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question? It's a specific question.

MR. SOLOMON: Yes.

JUDGE SILBERMAN: And it's an analytical conundrum is it not?

MR. SOLOMON: Yes, I think it is. The ISO came to the commission and asked for netting over one month. The ISO could have --

JUDGE SILBERMAN: But now you're talking about netting for transmission.

JUDGE EDWARDS: Is that right?

JUDGE SILBERMAN: Not for power?

JUDGE EDWARDS: Is that right?

MR. SOLOMON: It's netting for transmission but also netting for power because the ISO operates a real time and a day ahead market. It operates a real time market in order to balance the system, in order to make sure that the system is reliable.

JUDGE SILBERMAN: Wait a minute, counsel. Wait a minute. The netting for purposes of power is on an hourly basis.

MR. SOLOMON: No, netting is over a monthly --

JUDGE SILBERMAN: For transmission.

MR. SOLOMON: For both transmission and power.

JUDGE SILBERMAN: I thought you were charged on an hourly basis on power?

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MR. SOLOMON: The actual charge, the actual bill does not occur until 30 days has passed. This is the reason the ISO --

JUDGE SILBERMAN: Yes, but if --

JUDGE EDWARDS: They're doing something on an hourly basis.

JUDGE SILBERMAN: (Indiscernible.)

JUDGE EDWARDS: But we're (indiscernible).

JUDGE SILBERMAN: After the bill comes out in a month that doesn't ask whether if I've drawn power off the grid from 8 o'clock to 9 o'clock, I'm charged on that hourly basis, right?

MR. SOLOMON:Right.

JUDGE SILBERMAN: If I have drawn power off the grid for, from 8:00 to 8:30 and put power back from 8:30 to 9 o'clock in excess of what I've drawn out, am I charged anything for power?

MR. SOLOMON:No. There's no charge.

JUDGE SILBERMAN: So you netted for an hour on the power. You're netting for a month on the transmission?

MR. SOLOMON:Yes, Your Honor. There is --

JUDGE EDWARDS: Is that right or are you just saying it because you don't know what to say?

MR. SOLOMON:No, that is correct.

JUDGE EDWARDS: No, seriously, because I'm trying,

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this is the one piece of the case that --

MR. SOLOMON:Right, that is correct.

JUDGE EDWARDS: -- that's perplexing.

MR. SOLOMON: Right. Commission said we're talking about two different things. For purposes of netting we're talking about netting to determine the amount of power and once we know the amount of power the generator is net positive or net negative, then we know the appropriate type of transmission service --

JUDGE EDWARDS: Transmission. Okay.

JUDGE SILBERMAN: Right.

MR. SOLOMON:-- to accommodate --

JUDGE SILBERMAN: Okay.

MR. SOLOMON:-- those sales.

JUDGE SILBERMAN: Now, petitioner argues that it's unreasonable for you to have a one month netting for transmission and a one hour netting for power.

MR. SOLOMON: Yes, petitioner makes that argument.

JUDGE SILBERMAN: What's your answer?

MR. SOLOMON: My argument is that monthly netting is reasonable. My argument is that hourly netting probably would have been reasonable. I know that from the earliest of the *PJM* cases.

JUDGE SILBERMAN: But why is it different for power then it is for transmission? Why is that reasonable?

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MR. SOLOMON: Because nothing has been purchased within that hour. Surely there's some type of accounting or computer entry to indicate that for that one hour the generator is leaning on the system but for purposes of determining whether, in fact, there will ultimately be payment for a sale or service, the ISO simply doesn't know that for 30 days.

JUDGE SILBERMAN: So it's de facto monthly.

MR. SOLOMON: Yes.

JUDGE SILBERMAN: In other words, it's an hourly charge but since they bill on a monthly basis it's de facto monthly.

MR. SOLOMON: Yes, in fact that was the principle reason given by --

JUDGE SILBERMAN: I see.

MR. SOLOMON: -- the ISO when it came in with monthly netting. It explained that the ISO itself bills and accounts on a monthly basis.

JUDGE SILBERMAN: I got it.

MR. SOLOMON: And it's just simply easiest for the ISO to do all of this on a monthly basis.

JUDGE SILBERMAN: Okay, that explains it. Thank you.

MR. SOLOMON: I'm not saying one hour wouldn't have been a reasonable --

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JUDGE SILBERMAN: For transmission?

MR. SOLOMON: Yes. That very well might have been reasonable. We know that from the *PJM* proceedings.

JUDGE SILBERMAN: Who controls the ISO?

MR. SOLOMON: The ISO is an independent not for profit entity --

JUDGE SILBERMAN: Counsel, I am aware of that. Who controls the ISO? They initially took a position that seemed to be pro-utility. Then they turned around and took a position that seemed to be pro-generator. I was sort of curious, who controls them?

MR. SOLOMON: Well, of course, the FERC controls the ISO.

JUDGE SILBERMAN: No, they regulate them. Who controls them? It's body. It's a non-profit. Who controls them?

MR. SOLOMON: It is controlled by the agreements of the transmission owners who agree to turn over operational control of the facilities that they own over to the ISO. These agreements, are, of course, submitted to the Commission for its approval.

JUDGE SILBERMAN: So the transmission owners are the old utilities?

MR. SOLOMON: Yes.

JUDGE SILBERMAN: Right. So if the old utilities

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control the ISO why are they taking a position contrary to the old utilities. I don't get it.

MR. SOLOMON: Well, in terms of controlling the ISO there --

JUDGE SILBERMAN: Somebody sits down around a board of directors and said we want to take this position. And I'm trying to read through. I was trying to figure out who had the control.

MR. SOLOMON: There are various committees, there are various working groups, and in fact, that's one of the issues in this case as to when an ISO can make a filing. My understanding is that the management committee of the ISO is made up of representatives of all of the various sectors of the industry decides (indiscernible) --

JUDGE SILBERMAN: Including the generators? Including the merchant generators?

MR. SOLOMON: Yes, including all sectors. In fact, that's one of the issues here as to whether there was a definitive super majority vote.

JUDGE SILBERMAN: I remember that. Yes, that was another issue.

MR. SOLOMON: That's another issue. And that issue arose from whether, in fact, the ISO was compelled to make this

filing in light of the directives in the earlier *PJM* cases and the first *KeySpan* case and how much discretion it

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had in making the filing.

JUDGE SILBERMAN: And if I understand it correctly FERC said it's totally up to the NYISO whether they want to --

MR. SOLOMON: Yes. Yes, as to one month netting. What the Commission said was that in light of the earlier *PJM* orders and in light of the first *KeySpan* order the Commission had already decided with respect to New York, with respect to New York utilities that generators can self supply. They can self supply over a reasonable period of time and the circumstances in which you have a sale and the circumstances in which you have local distribution. The only issue left for the ISO by the time it made the filing that kicked off the first of the eight orders that are actually under review is what is a reasonable netting period.

JUDGE SILBERMAN: Now I have another technical question for you. If a merchant generator sells power into the ISO, sells power into the ISO, and there is a netting, number one, when it sells power, it sells wholesale, right?

MR. SOLOMON: Yes.

JUDGE SILBERMAN: It's not retail.

MR. SOLOMON: Correct.

JUDGE SILBERMAN: So it's strictly within --

MR. SOLOMON:Right, that's the definition of a wholesale merchant generator.

JUDGE SILBERMAN: Right. Wholesale. So that's

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strictly a wholesale sale in to, under FERC's jurisdiction, right?

MR. SOLOMON:Right.

JUDGE SILBERMAN: Now, if there is a netting, that is to say, a reduction in the price that the merchant generator charges in selling into the ISO because of a use of a certain amount of energy for its station power, that's a reduction in the wholesale price?

MR. SOLOMON:Yes, exactly.

JUDGE SILBERMAN: So it's a netting of a wholesale price. So even if it was a sale, it would be a wholesale sale.

MR. SOLOMON:Exactly. That's what this case is about.

JUDGE SILBERMAN: No, but their view is this is not a sale at all. But even if it was a sale it would be a wholesale sale in FERC's jurisdiction?

MR. SOLOMON:Yes, that is our jurisdictional hook.

JUDGE EDWARDS: Let me ask you a couple of, again, I want to make sure I have the picture straight in my head. If the merchant generator is in a negative position for the month, so there is a payment due, to whom is it paid and on what

tariff? It's a transmission charge and it's paid to whom, is that right?

MR. SOLOMON: The payment for the commodity because

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the merchant generator is negative either because that unit is negative or it can't remotely self supply --

JUDGE EDWARDS: Right.

MR. SOLOMON: -- the payment is to the New York ISO not under the transmission tariff.

JUDGE EDWARDS: So it's a retail sale. And the payment is governed by the state tariff.

MR. SOLOMON: Yes.

JUDGE EDWARDS: On transmission?

MR. SOLOMON: Right. Under the open access transmission tariff service would be taken under part 4 for transmission to accommodate the retail sale.

JUDGE EDWARDS: Now let me ask you this question before Judge Silberman asks the questions. Now if it's in positive position, there's no charge?

MR. SOLOMON: That's correct.

JUDGE EDWARDS: Okay. I understood it but I want to make sure I have the picture completely clear in my mind.

JUDGE SILBERMAN: Now let me carry on with Judge Edward's point. So make sure we understand. If there is, at the end of the month if the merchant generator is in a negative position or sometimes referred to as the wholesale generator is in a negative position, you say there is a payment to the ISO for transmission services.

JUDGE EDWARDS: To the New York ISO.

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JUDGE SILBERMAN: Yes, the New York ISO.

JUDGE EDWARDS: Right.

MR. SOLOMON: If in fact transmission service is being taken.

JUDGE SILBERMAN: Wait a minute.

JUDGE EDWARDS: No, come on, it nets out negative.

MR. SOLOMON: Yes.

JUDGE EDWARDS: It's been back and forth a 100 and there are negative positions.

JUDGE SILBERMAN: Why is there a payment, but isn't there, wait a minute. At that point you've always conceded then state jurisdiction arises like a springing use, doesn't it?

MR. SOLOMON: Yes.

JUDGE SILBERMAN: Okay. If State jurisdiction arises when the merchant generator is negative, and the only

payment is for transmission services, why does State jurisdiction arise?

JUDGE EDWARDS: That's what --

JUDGE SILBERMAN: Transmission is federal.

JUDGE EDWARDS: That was what I was going to next ask but I knew my colleague would.

MR. SOLOMON: It just simply depends upon whether transmission services or local distribution services or both is necessary to accommodate the retail sale.

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JUDGE EDWARDS: No, no. We're using this netting as a proxy to figure out whether there's a sale but I'm trying to figure out, that's why I started out by saying to whom are we paying and for what? Because if you say transmission then I get confused again, just the way Judge Silberman is asking, if it's transmission how did that become state?

MR. SOLOMON: Well, I was trying to differentiate between the sale of the commodity which is the power itself and the delivery of that commodity with respect to the --

JUDGE EDWARDS: Wait a minute. Do it this way for me. At the end of the month under FERC's scenario, you can be negative or positive? So someone figures that out?

MR. SOLOMON: Yes.

JUDGE EDWARDS: All right. That person at that desk, what have they figured out and then what are they going to do? Just

put a person at that desk and tell me okay this person is negative. What does that mean and to whom are we paying what for what and (indiscernible)?

MR. SOLOMON: That person is someone who works for the ISO.

JUDGE EDWARDS: Okay.

MR. SOLOMON: The ISO determines whether in fact the generator is positive or negative.

JUDGE EDWARDS: Okay.

MR. SOLOMON: If the generator is positive --

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JUDGE EDWARDS: Forget the positive.

MR. SOLOMON: Okay.

JUDGE EDWARDS: Negative.

MR. SOLOMON: If the generator is negative, that means that it has to purchase its station power from a third party.

JUDGE EDWARDS: It did purchase. It did purchase?

MR. SOLOMON: That's correct because power always flows.

JUDGE EDWARDS: Right.

MR. SOLOMON: There is a retail sale. The transaction is with the ISO. The ISO will then remit that payment to

whomever the ISO determines is the appropriate supplier of that retail power.

JUDGE EDWARDS: So we're not breaking it down as transmission or power. We're just saying that they're in a negative position. They received power and they have to pay for it.

MR. SOLOMON: Yes.

JUDGE SILBERMAN: At a retail rate.

JUDGE EDWARDS: At a retail rate.

MR. SOLOMON: Yes.

JUDGE SILBERMAN: Which includes the power, the transmission --

JUDGE EDWARDS: The transmission.

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JUDGE SILBERMAN: -- and the local delivery?

MR. SOLOMON: Right, because transmission is taken under part 4 of the open access transmission tariff --

JUDGE EDWARDS: All right, I understand.

MR. SOLOMON: -- and that charge is based upon the New York retail charge.

JUDGE GRIFFITH: I have a more fundamental question.

JUDGE SILBERMAN: Thanks a lot.

JUDGE EDWARDS: Right. (Indiscernible.)

JUDGE GRIFFITH I can understand why FERC would have the authority under the statute to determine what is wholesale and what is not wholesale and has done that. Where is the authority to make the next decision and that is what is retail and what is not. Isn't that something that clearly belongs to the State? I mean, it's one thing for you all to say this is wholesale or not wholesale. When you determine it's not wholesale, doesn't that end your authority and your jurisdiction?

MR. SOLOMON: Well, you're correct under Section 201 of the Federal Power Act which is --

JUDGE GRIFFITH: So why are you then going the next step and determining what is retail or not?

MR. SOLOMON: I submit that this decision was made by the Supreme Court in *New York v. FERC* which is 535 U.S. 1. That's the 2002 decision. The Commission is trying to

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determine whether, in fact, a FERC jurisdictional service has been provided. Your Honor is correct that the Commission's jurisdiction is limited to transmission under the --

JUDGE SILBERMAN: Wholesale or transmission. Both of those factors, right?

MR. SOLOMON: Exactly. A sale of electricity at wholesale or the transmission of electricity in interstate commerce, the

State has jurisdiction over any other sale and has jurisdiction over facilities used for local distribution. This is similar to what happened in our order 888 rule-making concerning open access transmission service. The Commission determined and the Supreme Court upheld that the FERC upheld that the FERC has jurisdiction over unbundled transmission to accommodate a retail sale. But in determining what is transmission the Commission also had to determine what is local distribution and had to divine a test for differentiating between the two. That is the seven factor test that is referenced in all of the briefs.

JUDGE GRIFFITH: But in this Court's decision, in the Supreme Court decision it's one thing to create a test that helps you to determine whether it's local distribution or not. It's another to decide that it is local distribution and to regulate it in this way. Haven't you gone too far here? Isn't this something that belongs to the State?

MR. SOLOMON:I don't think so, Your Honor.

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Fundamentally what the Commission is trying to do is establish the parameters of FERC jurisdictional service. The State --

JUDGE EDWARDS: Let me, what you are essentially answering to Judge Griffith is the State is barred from a certain scenario because it is transmission and it results in wholesale and we determine how that gets managed?

MR. SOLOMON:Yes, Your Honor.

JUDGE EDWARDS: And in the other scenarios, that's for

the State but in the scenario where you're saying there is, it's positive and the proxy is at work, you're saying that's clearly within our realm and we regulate how it operates so the State can't. Is that your --

MR. SOLOMON: Yes, Your Honor.

JUDGE EDWARDS: Okay.

MR. SOLOMON: Thank you.

JUDGE GRIFFITH: Mr. Simon, you have five minutes.

ORAL ARGUMENT OF KENNETH M. SIMON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SIMON: I'm certainly not too tall to argue. My name is Kenneth Simon and I represent the Competitive Generators who are intervenors in this proceeding. I'd like to begin by clearing up the difference between an end user and a retail consumer. That's one of the things you were talking to Mr. Farrah about. A retail consumer is someone who purchases electricity and uses it. All retail consumers are

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end users. But not all end users are retail consumers. End users who self supply station power, for example, are not retail consumers.

JUDGE SILBERMAN: That is an argument that petitioners suggest, that all end users are retail buyers but it's clear from FERC's brief and its opinion that they disagree with that.

MR. SIMON: Correct, and I think they disagree with it for good reasons.

JUDGE SILBERMAN: Yes.

MR. SIMON: The notion of a retail sale generally involves two parties and a change of title. When you're self supplying there's only one party and there's only one change of title. Perhaps a better way to think about station power is like money put into a bank. You take the money in, you take it out, you may even be negative at some times if the bank extends you credit and you have a loan. The dollars that you're taking out, the cash you get from the bank, is rarely the same cash that you put in, but still it's all netted out and you're dealing with your own bank account and you're borrowing or putting money into your own bank account. And that's what FERC means when it says that generators historically have leaned on the grid. They've treated like a bank account, put it in and out. That's something that has been done for decades. FERC found that the utilities

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themselves never regarded leaning on the grid as a sale. FERC never regarded leaning on the grid as a sale. And I believe with the discussion you had earlier about the principle of netting, be it for an hour or be it for a month, frankly everybody in this room is essentially conceded the point that there's not a sale.

But once you concede the point that there's not a sale, I think a great deal is undercut from the petitioners argument. Particularly their arguments on 888. Because they've seized on language in 888 that says power delivered to an end user necessarily has an element of State jurisdiction. But they're

taking that sentence out of the context of what 888 is really talking about. In fact, the first time FERC says that the State has jurisdiction over deliveries to an end user, the very sentence before it says in the context of retail wheeling deliveries to an end user have an element of State jurisdiction and the reason why that's so important, I think, goes to the question you were just asking, Judge Griffith. What FERC was looking to do in 888 was to find a basis for states to assess stranded costs on retail customers who took unbundled retail transmission. Former retail customers, current retail customers, but people who suddenly became unbundled transmission customers. Now normally you would think, and I think Judge Silberman called this a fiction, FERC has exclusive jurisdiction over retail transmission. But what

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FERC did in order 888 was to say since this used to be a bundled sale and when it was a bundled sale the State had jurisdiction over the transmission component, we're going to allow the State to continue to assess stranded costs on that transmission component over which it used to have jurisdiction. That's the theory and that's what order 888 is about. It's extending the State's jurisdiction frankly, not limiting the State's jurisdiction.

But here the petitioners go too far. Here, while FERC was willing to say for a former retail customer, where the State once had jurisdiction it still has jurisdiction. When it comes to merchant generation they never had jurisdiction. For merchant generation which largely didn't exist before 888, there was no State jurisdiction over the netting of power on the grid. So the whole jurisdictional theory behind why retail transmission could be subject to State stranded costs simply

doesn't apply in the case of retail transmission or in the case of deliveries on the grid or leaning on the grid by generators.

There were a couple other points I wanted to get to. One is on discrimination. First, FERC never found that it's only five percent. In fact, when counsel for the Public Service Commission mentioned my client, the New York Power Authority, as part of it, New York Power Authority owns 8,000 megawatts. That's a lot more than five percent. It is also a

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transmission owner but it's also a generator and that's why it's on this side of the case. Secondly, in additional to --

JUDGE SILBERMAN: You're both a generator and a transmission and you have what lines in transmission?

MR. SIMON: Yes.

JUDGE SILBERMAN: And you're on this side of the case?

MR. SIMON: Yes.

JUDGE SILBERMAN: Because your generator is more important than your transmission lines?

MR. SIMON: Well, I'd like to tell you it's because we think it's what's right and fair, Your Honor.

JUDGE SILBERMAN: No, counsel. We would never believe that.

JUDGE EDWARDS: After you looked at the bank account you figured out what was right and fair.

MR. SIMON: I see my time is up. I wanted to make one other point. FERC also said that they were concerned about my clients competing with utilities, not just the generation utilities owned but the sales they made. The utilities have a lot of power under long term contracts that don't reference station power. The utilities in fact, were kind enough in their courtesy appendix at 323 to provide a list of all the units controlled by all the entities. And you'll see there's a lot of, and you can't tell whether it's

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owned or controlled but there's a lot of utility control generation that's competing against the generation that my client's provide for sales into the wholesale market. So the discrimination issues (indiscernible) --

JUDGE SILBERMAN: You know, even though the utilities have divested themselves of generators, even assuming 95 percent of them did, they still buy generators elsewhere, control or control through long term contracts?

MR. SIMON: Even, generators in New York, primarily. They have long term contracts with the generator in New York. That long term contract does not pass through station power costs.

JUDGE SILBERMAN: I see.

MR. SIMON: So they're not paying them. The generators supplying them may have to pay them if they exceed (indiscernible).

JUDGE SILBERMAN: I see. I see. That's an interesting point. Thank you.

MR. SIMON: Thank you very much.

JUDGE GRIFFITH: Mr. Farrah have time?

THE CLERK: No time remaining.

JUDGE GRIFFITH: Give you two minutes, Mr. Farrah. Two minutes for everybody.

THE CLERK: Two minutes.

MR. FARRAH: I thought I reserved four minutes.

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JUDGE EDWARDS: You did but you used it.

JUDGE GRIFFITH: You did but you used it. We'll give you three minutes.

MR. FARRAH: All right. Thank you. Part of the problem here is --

JUDGE SILBERMAN: That's what you call a netting.

MR. FARRAH: Part of the problem here is the circular logic. I mean, this notion that not all consumers are actually purchasing, well, that's true. There are times when a generator is purchasing its own electricity on site and he's consuming it. And we're certainly not claiming that that's a sale. Our point is that when that generator is shut down and is not producing electricity for its own needs and the FERC

says get it from the NYISO, get it on an hourly basis, pay them for it, that is a sale by any definition.

I'd like to refer you to part, the NYISO's tariff which we have appended to our brief which, I don't know in three minutes if I can read this but I'll give you a reference. It says, this is the general, this is the section article 4, Market Services Rights and Obligations, "market services include all services and functions performed by the ISO under this tariff related to sale and purchase of energy capacity or demand reductions in the payment to suppliers who provide ancillary services." It goes on to say "each market participant that sells or purchases energy including demand

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(indiscernible) resources, sells or purchases capacity or provides ancillary services must take service under this tariff." The NYISO's tariff is very clear that these hourly transactions that are going on are purchases and sales. Okay, and under FERC's theory, if still, at the end of the month it nets out no transmission occurred. Somehow or other, sales, 24 hours a day for 29 days of the month can occur –

JUDGE SILBERMAN: So you're concerned there's a fiction there?

MR. FARRAH: Well, I think it's pretty obviously fiction.

JUDGE SILBERMAN: It's a fiction, right?

MR. FARRAH: It's a fiction --

JUDGE SILBERMAN: But you're basing your whole argument on the fiction of 888.

MR. FARRAH: No, I'm not.

JUDGE SILBERMAN: Is it fair to say he who lives by the fiction dies by the fiction?

MR. FARRAH: No, I'm not, Your Honor. I'm talking now about a sale. I'm talking about --

JUDGE EDWARDS: Analytically the problem for you is there's a fiction in the hour too. It's no different.

MR. FARRAH: No there is not because --

JUDGE EDWARDS: Yes, there is.

MR. FARRAH: -- because --

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JUDGE EDWARDS: Yes, there is, depending upon the hypothetical that we set up. It's the same thing.

MR. FARRAH: No, but the sale is going on an hourly basis, Your Honor, and the question here is where is the conflict between FERC and state jurisdiction? FERC measures wholesale sales on an hourly basis. It measures wholesale transmission on an hourly basis. The only thing it measures on an hourly basis is this notion of whether self supply is occurring which FERC admits --

JUDGE EDWARDS: That doesn't make it wrong.

MR. FARRAH: FERC admits it's --

JUDGE EDWARDS: It just means it's another way of doing it.

MR. FARRAH: No, my point is, Your Honor, that FERC admits that self supply is not subject to its jurisdiction. This is what FERC says, "as relevant here we have held that a generated self supply of all station power is not within our jurisdiction as it does not involve a sale and that the third party provision of station power is likewise not within our jurisdiction as it is a sale for and use." So what we have here is --

JUDGE SILBERMAN: What were you reading from?

MR. FARRAH: I'm reading from *KeySpan II*. It's the first page of the order dated August 21st, 2002 and it's joint appendix 102.

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JUDGE EDWARDS: Do you think you have State control behind the meter?

MR. FARRAH: If it's behind the meter, no.

JUDGE EDWARDS: Of course not. And that's all FERC has said here on the self supply from a remote generator. It's the same thing. It's the same analogy. So I mean, it's not a compelling argument that you're making.

MR. FARRAH: Your Honor, I must say --

JUDGE EDWARDS: It's the equivalent of behind the meter. It's within the same operation.

MR. FARRAH: With due respect, Your Honor, FERC isn't only talking about remote generation. They're allowing, whether they have a remote generator or not, the FERC is allowing the generator to go into the NYISO market, take power off of the grid from wherever it came from, okay, all month long, and they have to pay for it --

JUDGE EDWARDS: Or hour long.

MR. FARRAH: They pay for it on an hour long basis.

JUDGE EDWARDS: That's the big breakdown in your argument.

MR. FARRAH: Here's my question to the FERC. Okay, if a generator supplies one, takes one megawatt off the grid and the price in that hour was $2.00 and then he puts one megawatt back in, okay and the price is an hour at that hour. Okay?

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JUDGE SILBERMAN: Is the prices is what?

MR. FARRAH: The price is one dollar. So he took one megawatt out and he had to pay $2.00. He put one megawatt back in and he only got a dollar for that. So, it's cost him, even though he was, it was a net wash at the end of the month, he had to pay the NYISO a dollar.

JUDGE SILBERMAN: But you're not going to wait until the end of the month, right?

MR. FARRAH: Yes. That's only a billing issue. That's not a measurement period.

JUDGE EDWARDS: But the same thing is true if you did it on an hourly basis which you've conceded.

MR. FARRAH: Your Honor, what is --

JUDGE EDWARDS: Analytically it makes no sense what you're arguing. It doesn't matter. It's a fight over whether they can justify the month but in terms of the construct, you've conceded that. The same scenario can occur within one hour. Exactly the same.

MR. FARRAH: The same scenario could occur within one hour, that's true.

JUDGE EDWARDS: Right.

MR. FARRAH: But, but, the difference, Your Honor, is that FERC would not have called anything that took place within the hour a sale. We have a tariff --

JUDGE EDWARDS: If they're in a negative position?

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MR. FARRAH: If it's negative, yes.

JUDGE EDWARDS: Yes, well, that's my point.

MR. FARRAH: I thought we were dealing with (indiscernible).

JUDGE EDWARDS: All you're quibbling over is a month. I mean, the State even concedes that. All you're quibbling over is a month. It's just a policy call which the State said. A month, or an hour.

MR. FARRAH: No, that's true, Your Honor. What I'm quibbling about is the fact that the FERC and NYISO tariff calls the transaction that occurs on an hourly basis a sale and it prices it on the basis of a sale. It then turns around and tells the State that no, and they agree that that's a retail sale, because if it's a sale (indiscernible) --

JUDGE EDWARDS: If they're in a positive position.

MR. FARRAH: In the hour.

JUDGE EDWARDS: In a positive position.

MR. FARRAH: Right.

JUDGE SILBERMAN: You mean a retail sale? No, it's not a retail sale.

MR. FARRAH: It is a retail sale because if it's a sale for station power, okay, then that's a retail sale because it's for end use.

JUDGE SILBERMAN: Wait a minute. Wait a minute.

JUDGE EDWARDS: No.

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JUDGE SILBERMAN: Even if you had a net negative, well, wait a minute. If it was an hour --

JUDGE EDWARDS: And a negative.

JUDGE SILBERMAN: If it was an hour and a negative, that would be a reduction in the wholesale price.

MR. FARRAH: No.

JUDGE SILBERMAN: Well, okay. Let's say if you're netting over an hour and it's positive, you're reducing the cost on a wholesale price basis, aren't you?

MR. FARRAH: No.

JUDGE SILBERMAN: Yes, you are.

MR. FARRAH: No.

JUDGE SILBERMAN: You have to be. You're netting, you can net apples and oranges. You're netting apples.

MR. FARRAH: That's the point, Your Honor, exactly. What FERC says is that if you do find a sale of station power it's a retail sale.

JUDGE SILBERMAN: Yes, if you do, but we're determining whether there is a sale.

MR. FARRAH: Well, if the FERC is basing sales on an hourly basis and you're negative for that hour --

JUDGE EDWARDS: What?

MR. FARRAH: -- it means you weren't running. And you consumed --

JUDGE SILBERMAN: But let's assume your positive

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within the hour. Let's suppose you're, let's, wait, let me

show you what happens. Let's suppose the sale of power into the ISO is on a dollar at a wholesale rate. And so you've sold $2.00, two megawatts, so let's say $2.00 in a half hour, and you've taken $1.00 worth in the other half hour, so you're positive $1.00. You subtract the $1.00 at the wholesale rate from the $2.00 at the wholesale rate. Isn't that correct? Yes. So that's what, they're treating the whole thing as a wholesale matter anyway.

MR. FARRAH: No, it isn't, Your Honor. It's only wholesale if it's going from the generator into the grid.

JUDGE SILBERMAN: That's what I'm talking about.

JUDGE EDWARDS: Right.

JUDGE SILBERMAN: Generator into the grid, $2.00. Generator out of the grid, $1.00.

MR. FARRAH: And when you're --

JUDGE SILBERMAN: But that's $1.00 not at retail price. It's $1.00 at a wholesale price.

MR. FARRAH: The point is, Your Honor, when you're negative it's a retail sale because you're (indiscernible) --

JUDGE SILBERMAN: No, I'm talking about positive. And I'm talking about the positive, the $1.00 that you were taking off is an offset against the $2.00. But it's not $1.00 at a retail price, it's $1.00 at a wholesale price.

MR. FARRAH: It was one dollar at a, if you consumed

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a megawatt in an hour and paid $1.00, that's one dollar in a retail sale.

JUDGE SILBERMAN: Not if it's netted. If it's netted on the wholesale.

MR. FARRAH: They only net hourly, Your Honor.

JUDGE SILBERMAN: Look, all right, I give up.

MR. FARRAH: The point here is that FERC is determining the line between self supply which it agrees it has no jurisdiction over and a retail sale which it agrees it has no jurisdiction over and it's telling the state that they have to do something different then what FERC does. FERC prices sales on an hourly basis and they also price transmission by the way, on an hourly basis. So, you know, it's, there's no need, there's no inconsistency here. And one last point.

JUDGE GRIFFITH: Mr. Farrah, your time has expired. Thank you very much. Case is submitted.

(Recess.)

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-002

[Filed October 11, 2002]

New York Independent System Operator, Inc.)

PROTEST OF TARIFF FILING

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Protest Requesting Modification of Tariff Filing in the captioned proceeding.[1]

Copies of all documents and correspondence should be sent to:

Lawrence G. Malone,
General Counsel
Public Service Commission

[1] NYPSC previously intervened in this Docket by a Notice of Intervention and Protest of the New York State Public Service Commission dated March 28, 2001.

of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Ronald Liberty, Director
Federal Energy Intervention
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

In an Order Granting Complaint in Part and Requiring New Tariff Filing (Order Requiring Filing) issued May 15, 2002 in this proceeding,[2] the Commission directed the New York Independent System Operator, Inc. (NYISO) to address the transmission of station use power in a services tariff. In requiring the filing of a tariff, the Commission referenced its PJM Orders, where it defined station power; found that a generator's self-supply of station power does not involve a sale of energy; and, decided that the third-party supply of station power generally is a sale for end use not subject to its jurisdiction under the Federal Power Act. The Commission also determined, however, that the delivery of station power might involve unbundled retail transmission, a matter subject to its jurisdiction.[3]

On September 20, 2002, NYISO filed its station power tariff in compliance with the Order Requiring Filing. NYISO contends that its new station power rules resemble PJM's,

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[2] Docket No. EL01-50-000, 99 FERC ¶ 61,167 (2002).

[3] PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001) (PJM II); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (PJM III).

ensuring that merchant and utility-owned generators receive comparable treatment. It also disavows any effort to intrude upon State jurisdiction over distribution service and retail sales, which it excludes from mention under its tariff.

NYISO has successfully arranged for the netting of a generator's self-supplied energy usage against its production output. As with the PJM Orders, the netting is not treated as a sale or purchase of energy and, under NYISO tariff, the generator may self-supply against output produced either on-site or from a remotely-located sister generator. NYISO, however, has failed to implement the Commission's directive to properly unbundle and charge for the use of the transmission system needed to make deliveries of that netted energy, because it exempts generators from the ancillary services charges that adhere to similarly-situated customers.

Moreover, by being silent on the continuation of state-jurisdictional charges, the NYISO tariff fails to demarcate the boundary between State and Federal jurisdiction. In order to avoid future disputes over the imposition of retail charges pursuant to state tariffs, the Commission should revise the NYISO tariff to allow for state imposition of retail stranded cost and customer charges.

I. The NYISO Tariff Fails to Properly Charge Generators For Unbundled Transmission Service

NYISO fails to properly charge generators for their use of the transmission system in taking delivery of self-supplied energy for netting against their generation output, whether on-site or from remote locations. Section 4.24(f) of the proposed tariff states that a generator "will not incur any charges for transmission service" when taking delivery of station power that is self-supplied for netting on-site through a location-

based marginal pricing (LBMP) transaction. Also under that section of the tariff, if the generator accomplishes the same netting with generation self-supplied from a remote location, it is exempt from ancillary services charges, but it pays for transmission service under Rate Schedule 7 of the NYISO Open Access Transmission Tariff (OATT). If the generator takes energy from a third party, however, under § 4.24(e), it falls under Part IV of the ISO OATT, and must pay for ancillary services pursuant to that tariff, just like any other retail access customer. There is no rational basis for the proposed tariffs' disparate treatment of delivery of energy from a third party and delivery of self-supplied energy.

NYISO's approach to exempting delivery service upon netting from ancillary services charges contrasts sharply with its careful accounting for the netting of the energy usage itself. As NYISO notes, for any period where a generator nets on-site by withdrawing energy from the NYISO transmission system to meet its station power needs, it will pay the applicable NYISO LBMP for that energy. These payments will be netted against the generator's production in other hours, without the netting of energy imbalances. NYISO describes this approach as avoiding adverse impacts on energy prices. Moreover, NYISO will track generators' self-supply of station power and their use of station power obtained from third-party suppliers. This information, NYISO emphasizes, will be incorporated into its billing and accounting processes.[4]

This carefully-constructed system for properly tracking and accounting for energy usage adequately supports development of proper charges for delivery system usage. Measurement and metering of the energy usage will yield all

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[4] NYISO Filing Letter, pp. 7-8.

the data on delivery system usage needed to charge for the delivery of the netted generation, whether netted on-site or from remote locations. In on-site netting, the self-supplied generation is delivered just as in any other LBMP transaction, notwithstanding the fact that there is no sale or purchase of the energy upon netting. Consequently, generators netting on-site should pay the appropriate ancillary services charges just like any other LBMP customer.

Exempting generators that remotely self-supply from ancillary services charges would have even less of a basis than exempting charges upon on-site netting. Generators netting remotely must pay the applicable rate for firm point-to-point transmission service under Rate Schedule 7 of the NYISO OATT. To charge them for that service while exempting them from ancillary services charges, when the same transmission data must be measured for both, would not be justifiable.

Further, when generators purchase energy from a third-party supplier instead of self-supplying, NYISO's proposed tariff would treat them like other purchasers from third-party suppliers under Part IV of the NYISO OATT. NYISO does not explain how it would be reasonable to treat generators making these third-party purchases the same as other non-generator customers, when exemptions are allegedly appropriate if the same generator nets the same amount of energy (either on-site or remotely). Seeking non-discriminatory treatment of utility and non-utility generators would not be a valid justification because New York utilities have divested nearly all of their generation.

NYISO attempts to justify the exemption from the charges for the ancillary services needed to deliver netted energy on the grounds that the relatively small "volume" of the charges

involved would not justify the "cost" of recovering them.[5] NYISO does not offer a reason for reversing its prior position that a waiver of ancillary services charges would be inappropriate because of the magnitude and scope of its "numerous ancillary services markets."[6] NYISO also does not address why generators should be favored over other similary-situated and sized customers, who also take transmission service and use transmission equipment in LBMP and Rate Schedule 7 transactions in exactly the same fashion as the generators.[7] These other customers are not exempted from ancillary services charges because the "costs" of recovery are high compared to the "volume" used.

NYISO's claim that it would be difficult to measure ancillary services use is similarly unsupported. As discussed above, since NYISO will carefully measure the hourly energy use at a generator when its unit is out of service, NYISO will have all the data on the use of the delivery system it needs to develop and bill the charges. Again, there is no distinction between a generator and any other similarly-sized customer that may choose to take energy deliveries from the ISO. If it is too "difficult to measure" use of ancillary services by generators upon delivery of netted energy, the same reasoning would adhere to other similarly-situated customers.

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[5] NYISO Filing, p. 8.

[6] Order Requiring Filing at ¶ 61,678.

[7] There are many commercial and industrial customers serving their load with on-site generation whose usage characteristics resemble the generators; those customers also take delivery only when their generators are out of service and can use energy supplied from the NYISO.

The generators' ancillary services exemption is therefore unduly discriminatory. All other transmission system customers pay for ancillary charges even when they make LBMP purchases or take delivery of energy under Rate Schedule 7. As there is no justification for exempting generators from the same requirement, doing so amounts to nothing more than discriminatory treatment in favor of the generators and against other ratepayers.

Moreover, the failure to properly charge generators for the ancillary services they use raises the potential for harmful impacts. All ancillary services supporting the transmission system must be recognized if the system is to operate efficiently. Disregarding the existence of a transmission impact for the purposes of the ancillary services exemption in this instance creates an ominous precedent for disregarding other uses of ancillary services. To pick and choose when ancillary services should be recognized ignores the operating characteristics of the transmission system, thereby threatening the security of its operations, which depends upon the accurate and vigilant measurement and control of actual services used.

The NYISO carefully preserves cost-based delivery and energy arrangements when it addresses in its tariff energy deliveries to generators from third parties. Its failure to take the same approach to the same delivery service when the energy is netted instead of delivered from a third party is not justifiable. Consequently, the ancillary services exemption should be removed from the tariff. To eliminate the exemption and avoid unwarranted discrimination, netted energy should be delivered on the same basis as third-party energy, under Part IV of the NYISO tariff.

II. The Commission Should Clarify the Application of State Jurisdictional Charges to Delivery Service For Netted Generation

NYISO announces its intention to avoid addressing state jurisdictional questions in its tariffs. If, however, the tariff can be interpreted as exempting generators from state charges, then it inadvertently creates a federal/state conflict. This conflict can be avoided if the Commission clarifies that netting of usage at generators, while an unbundling of the energy supply function, will not affect Order No. 888's findings on jurisdiction over delivery rates. As the Commission stated, "there is an element of local distribution service in any unbundled retail transaction"[8] and state jurisdiction over delivery service includes the "authority to impose non-bypassable distribution or retail stranded cost charges."[9]

Elaborating upon that principle, the Commission found in the BART Order,[10] that, even where there are no identifiable local distribution facilities, states have jurisdiction over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charge for transmission service. This state jurisdiction over distribution service permits the use of

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[8] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, FERC Stats. & Regs ¶ 31,036 at p. 31,783 (1996).

[9] *Id.* at pp. 31,781-82.

[10] *San Francisco Bay Area Rapid Transit District v. Pacific Gas & Electric Company*, 87 FERC ¶ 61,255 (1999).

suitably-developed retail rates for stand-by service, which may include non-bypassable customer or stranded cost charges, for customers taking delivery at either distribution or transmission levels.

Thus, the Commission should follow the BART Order. There is no reason to exempt generators that use delivery facilities from the customer and stranded cost charges that all other similarly-situated customers must pay. To do otherwise is discriminatory and would force other ratepayers to subsidize the generator's use of the electric system.

NYPSC has unbundled energy supply from delivery rates for generators taking station use.[11] To the extent that the NYISO tariff segregates generators as a separate class for stand-by service purposes, generators could apply for creation of appropriate rate sub-classes under the NYPSC tariffs that recognize their new NYISO status in netting the energy they use instead of otherwise purchasing it under applicable retail tariffs. Presumably, the generators could argue that the only remaining state charges, given netting, are customer and stranded cost charges.

Inasmuch as there is a retail delivery even when the delivered energy is not a sale because it is netted, requiring generators to continue to pay for these delivery charges is appropriate. This result can be accomplished by directing that netted energy be delivered under Part IV of the NYISO OATT, just as with any other New York retail energy

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[11] NYPSC Docket No. 99-E-1470, *Provision of Electric Stand-By Service*, Opinion and Order Approving Guidelines For the Design of Stand-By Service Rates, Opinion No. 01-4 (issued October 26, 2001).

transaction. Use of Part IV would thereby both resolve the jurisdictional question and eliminate the unwarranted ancillary services subsidy.

CONCLUSION

The NYISO tariff should be modified to provide that generators pay for the ancillary services associated with the delivery facilities they use in the course of netting generation. Moreover, the Commission should clarify that its Order No. 888 and its BART Order adhere to use of the delivery system by generators even where energy is unbundled and is obtained through netting instead of a sale. The Commission can achieve both goals by directing that netted energy be delivered to generators under Part IV of the NYISO OATT.

Respectfully submitted,

/s/
Lawrence G. Malone
General Counsel
Leonard Van Ryn
Assistant Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Dated: October 11, 2002

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-234-000

[Filed October 20, 2003]

Nine Mile Point Nuclear	)
Station LLC	)
	)

NOTICE OF INTERVENTION AND PROTEST

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Notice of Intervention and Protest in the captioned proceeding.

Copies of all documents and correspondence should be sent to:

Dawn Jablonski Ryman
General Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Ronald Liberty, Director
Federal Energy Intervention
Office of Electricity
and the Environment
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

In a complaint filed September 26, 2003, Nine Mile Point Nuclear Station, LLC (Nine Mile), the owner of a 1550 MW majority interest in two nuclear generation units located in Oswego, New York totaling 1,757 MW (the Nine Mile facilities), asks that the Commission preclude Niagara Mohawk Power Corporation (Niagara Mohawk) from charging for the retail standby electric services it supplies to the Nine Mile facilities. Nine Mile argues that the charges conflict with the New York Independent System Operators' (NYISO) Station Power tariff,[1] and are otherwise discriminatory. Those arguments lack merit, because the Commission has recognized that States have the authority to charge for retail delivery services provided to customers like Nine Mile; retail energy services are subject to State jurisdiction in any event; and, there is no discrimination. To the extent Niagara Mohawk's charges might duplicate charges within the scope of the NYISO tariff, Nine Mile may participate in Case 03-E-1016, the ongoing NYPSC proceeding it references where that issue is under

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[1] New York Independent System Operator, Inc., 101 FERC ¶ 61,230 (2002) (NYISO Station Use Order).

consideration.[2] Accordingly, NYPSC asks that the Commission reject the complaint.

BACKGROUND

Nine Mile was the winning bidder in the auction of the two Nine Mile facilities conducted in 2001 by Niagara Mohawk and other electric utility owners. The facilities, Nine Mile reports, deliver their output to the bulk transmission system through 345 kV facilities, while taking station use and standby service through 115 kV lines, all owned by Niagara Mohawk. Nine Mile claims the utility may not charge for the standby retail electric services it provides through its facilities to the generating facilities.[3]

Nine Mile premises its claim on the NYISO Station Use tariff that took effect on April 1, 2003. According to Nine Mile, taking station power service under that tariff precludes State utility charges because the tariff encompasses all electric delivery service needs, through the Nine Mile facilities' transmission level interconnections, and all energy service needs, through netting of the facilities' energy usage against energy production, either on-site or remote, over a 30 day

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[2] Nine Mile Complaint, pp. 10-11. See NYPSC Case 03-E-1016, Niagara Mohawk Power Corporation - Reduced Delivery Rates for Standby Service for NYISO Station Service Customers (filed July 10, 2003 in Case 01-E-1847).

[3] Standby service is the electric delivery and energy supplied to a customer that owns generation when its generator is out of service or otherwise does not meet all or a portion of the customer's load.

period.[4] Moreover, Nine Mile claims charging it for State retail services would be discriminatory because Niagara Mohawk did not charge itself for those services when the utility owned the Nine Mile facilities.

The Commission should deny the complaint. As the Commission has found, State retail charges can co-exist with Commission-jurisdictional transmission services charges.[5] To find otherwise would arbitrarily deviate from policies expressed in prior Orders,[6] where the Commission decided there is an element of local distribution service in any unbundled retail transaction, and that State jurisdiction over delivery service includes the authority to impose non-bypassable distribution or retail stranded cost charges.

Moreover, the energy a generator consumes when it is not operating is purchased at retail subject to State jurisdiction, and the netting of the cost of energy delivered to a generator at retail against the price for energy produced by that generator at wholesale is permissible only with the acquiescence of the State jurisdiction. In tolerating, to date, the NYISO netting arrangement, NYPSC in no way forgoes its jurisdiction to impose other retail energy charges, or to

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[4] Station power is the electric energy used for the heating, lighting, air-conditioning and office equipment needs of the buildings on a generating facility site, and for operating the electric equipment that is on the generating facility site.

[5] PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001 (PJM II).

[6] San Francisco Bay Area Rapid Transit District, 87 FERC ¶ 61,255 (1999) (BART Order) and 90 FERC ¶ 61,291 (2000) (BART Rehearing Order).

modify, in the future, netting arrangements affecting retail energy sales.

Finally, Nine Mile premises its discrimination claim on the character of service provided at a time it owned the facility, before the NYISO commenced operation and before competition was introduced into New York's electric market. These prior circumstances are irrelevant to the competitive market that exists today in New York, and are not evidence of discrimination.[7]

ARGUMENT

I. The Commission Should Reject Nine Mile's Complaint, and Reaffirm Its Prior Policies Permitting States to Impose Retail Charges.

In its Order No. 888, the Commission found that "there is an element of local distribution service in any unbundled retail transaction,"[8] and State jurisdiction over delivery service includes the "authority to impose non-bypassable

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[7] As Nine Mile points out, Nine Mile Complaint p. 11, similar issues regarding Niagara Mohawk's station power charges are pending before the Commission in two other complaint proceedings; NYPSC reiterates here the arguments it made in those proceedings. Docket No. EL03-204-000, AES Somerset LLC (complaint filed June 25, 2003); Docket No. EL03-27-000, Huntley Power LLC, et al. (complaint filed November 26, 2002).

[8] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), at 31,783.

distribution or retail stranded cost charges."[9] Elaborating upon that principle, the Commission found in the BART Orders that, even where there are no identifiable local distribution facilities, states retain authority over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charges for transmission service. This State authority over distribution service permits the use of suitably-developed retail rates for standby service, which may include non-bypassable customer or stranded cost charges, for customers taking delivery at either transmission or distribution levels.

To the extent Nine Mile relies upon the NYISO Station Use Order as establishing that states may not tariff standby charges for transmission level customers, that reliance is misplaced.[10] The Order does not address application of the principles established in Order No. 888 and the BART Orders to retail standby services furnished to customers at the transmission level, and so does not overrule those Orders.

In claiming that the State may not impose any charges for the standby services provided to it, Nine Mile ignores Order No. 888, and the BART Orders. Since those Orders provide that states may impose delivery charges on Nine Mile, it asks, in effect, that the Commission reverse its prior precedents without explanation. Since it has not justified such a reversal, its complaint is fatally flawed and should not be granted.

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[9] Order No. 888 at 31,781-82.

[10] NYPSC has petitioned for rehearing of the NYISO Netting Order, seeking clarification that it is not intended to reverse Order No. 888 or the BART Orders.

II. Netting Results In a Retail Sale Subject to State Jurisdiction.

When a generator is operating, and draws its electricity directly from its generating equipment, it self-supplies station power and there is no sale of energy. When a generator does not operate, however, its netting of the cost of the energy delivered to it against the price paid for its prior production is a retail sale, notwithstanding the net pricing arrangement under the NYISO station use tariff. While the Commission has jurisdiction to decide what is a wholesale sale, it concedes that none is present in station use;[11] once that determination is made, the Commission lacks the jurisdiction to rule that the energy consumed is not a retail sale.

Generators netting their energy costs most certainly do consume retail energy supply from the NYISO markets when their equipment is incapable of generating. Otherwise, they would not be able to operate their non-generation equipment or restart their generators. While netting may be a useful approach to accounting for that station use energy, it does not change the fact that the energy consumed is being purchased and used at retail. For the Commission to expand its jurisdiction into the area of these retail energy sales would be ultra vires.

Indeed, the Commission recently found that there is a retail sale when a generator purchases its station use energy from an independent third party.[12] A purchase from the NYISO market through netting is a third-party retail purchase

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[11] PJM II, at 61,894.

[12] Northeast Utility Services Company, 101 FERC ¶ 61,327 (December 18, 2002).

and sale just the same, even though the cost is accounted for through netting. Consequently,

> Order No. 888 applies; there is a delivery of energy that is consumed by an end-user (in this case, a generator receiving station power), the transaction retains an element of state jurisdiction, and [a utility] may impose state-approved charges on such retail deliveries regardless of who provides the energy, or whether a sale of energy occurs, or whether the delivery uses no identifiable distribution facilities.[13]

Therefore, NYPSC does not lose jurisdiction over energy sales at retail. It may attach to those sales at retail appropriate charges for the services provided. Nine Mile premises its complaint upon the theory that no such charges may be imposed. Since that theory is without merit, the complaint must be rejected.

III. Assessing State Retail Charges Against Nine Mile For Services Provided To It is Not Discriminatory.

As another justification for its complaint, Nine Mile maintains that it is discriminatory to charge it for standby service when it did not assess those charges against itself when it owned the Nine Mile facilities. This argument is not credible.

According to Nine Mile, discrimination exists because of the arrangements that were made for supplying station use energy to the Nine Mile facilities at the time before Nine Mile purchased them, before the NYISO entered operation, and

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[13] Northeast Utility Services Company, 101 FERC at 62,363.

before competition was introduced in New York via the NYISO. These prior circumstances are irrelevant. Niagara Mohawk has divested all of its generation, and other New York utilities have divested most of their generation as well. Consequently, there is no meaningful discrimination between utility ownership and non-utility ownership of generation facilities in New York.

Nine Mile argues that a discrimination finding may be premised on findings made in PJM II. Those circumstances, however, are not analogous to New York's. Unlike New York, in PJM, utilities continue to own generation in competition with independent generators. Since the type of discrimination allegedly present in PJM cannot exist in New York, Nine Mile's discrimination argument allegedly present in PJM is factually unsustainable.

Moreover, when New York's utilities were integrated, they recovered the cost of their station use energy and its delivery in their bundled retail charges to their customers. They did not suggest that their generators failed to consume energy for station use when out-of-service. In its attempt to evade Niagara Mohawk's standby service charges, Nine Mile would disregard its consumption of energy when its generator is out-of-service.

Nine Mile's discrimination arguments do not justify the relief it seeks. Its complaint cannot be granted on the grounds that discrimination has occurred.

IV. Nine Mile Has Failed To Justify Its Claim that Niagara Mohawk Imposes Unreasonable Charges Through Its Standby Tariff.

Nine Mile argues that it is a transmission-level customer, and that the charges Niagara Mohawk would impose on it are unreasonable given the services t takes from NYISO through interconnection with NYISO-controlled transmission facilities. The Commission is not the proper forum for addressing this complaint.

NYPSC adopted standby tariffs for Niagara Mohawk after extensive proceedings.[14] Nine Mile never presented in those proceedings any argument that any of Niagara Mohawk's charges were unreasonable. Moreover, to the extent that Niagara Mohawk's standby charges arguably might duplicate NYISO charges, the issue is under consideration in NYPSC Case 03-E-1016, supra. The Commission should await NYPSC's decision there.

In that proceeding, NYPSC is examining allegations that Niagara Mohawk's standby charges are duplicative and are otherwise overstated. Comments making those allegations were timely submitted in the proceeding by the Independent Power Producers of New York, Inc. (IPPNY), the trade organization Nine Mile references in its complaint.[15] IPPNY's arguments will be carefully considered, and a decision will be rendered that eliminates the potential for

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[14] Case 01-E-1847, Niagara Mohawk Power Corporation - Standby Service Rates, Order Approving Joint Proposal (issued June 21, 2002) and Order Denying Rehearing (issued October 4, 2002).

[15] Nine Mile Complaint, pp. 9-10.

overpayments that might occur from taking service under both Commission-jurisdictional station use and NYPSC-jurisdictional standby tariffs.

Instead of awaiting a NYPSC decision on duplicative State charges, however, Nine Mile claims that all State charges are improper. For the reasons discussed above, this claim has no merit and requires rejection of Nine Mile's complaint, without prejudice to the adjustment of Niagara Mohawk's tariffs to prevent overcharges in NYPSC Case 03-E-1016.

CONCLUSION

The Commission should deny the complaint filed by Nine Mile because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and it has failed to establish that discrimination exists. To the extent that it complains that it is overcharged because it takes service under both Commission-jurisdictional and NYPSC-jurisdictional tariffs, it should be directed to await NYPSC's decision in the ongoing proceeding NYPSC has instituted to address that issue.

Respectfully submitted,

/s/_____
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General Counsel

Leonard Van Ryn
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Albany, New York 12223-1350

Dated: October 20, 2003
Albany, New York

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-001

[Filed August 21, 2002]

KeySpan-Ravenswood, Inc.	)
	)
v.	)
	)
New York Independent System Operator, Inc.	)
	)

ORDER GRANTING REHEARING AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell

1. In this order, we grant the request of KeySpan-Ravenswood, Inc. (KeySpan) for rehearing of a Commission decision granting in part its complaint against the New York Independent System Operator, Inc. (NYISO), concerning the

NYISO's treatment of station power.[1] We set for investigation and hearing whether the facilities used to deliver station power are transmission facilities and, if so, what Commission-jurisdictional rates are appropriate for delivery of station power over those facilities. We will hold the hearing in abeyance, however, and establish settlement judge procedures to allow the parties an opportunity to resolve this matter through settlement. Our decision benefits the public by ensuring the orderly administration of Commission proceedings.

Background

2. In a series of recent cases, the Commission established the appropriate jurisdictional treatment of station power.[2] As relevant here, we held that a generator's self-supply of station power is not within our jurisdiction as it does not involve a sale[3] and that the third-party provision of station power is likewise not within our jurisdiction as it is a sale for end-use.[4]

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[1] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002) (May 15 Order).

[2] *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001) (PJM II); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (PJM III); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (PJM IV). In PJM II, 94 FERC at 61,889, we defined station power as:

> the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site.

[3] Id. at 61,889-91.

[4] Id.

However, we held that "the delivery of station power on an unbundled basis might involve unbundled retail transmission, which is subject to our jurisdiction."[5] This depended, the Commission explained, on the facts presented; i.e., whether the delivery of station power was transmission subject to Commission jurisdiction, or local distribution subject to state jurisdiction, or some combination thereof.[6]

3. KeySpan requested that the Commission confirm that self-supply of station power did not involve a sale, and require that the NYISO include in its service tariff provisions for the delivery of station power. KeySpan particularly objected to the NYISO's failure to permit netting of station power and subjecting all delivery of station power to retail tariffs.[7]

4. In the May 15 Order, the Commission granted KeySpan's complaint in part. We reiterated that self-supply of station power does not involve a sale and is therefore not jurisdictional, but that delivery of station power involving unbundled retail transmission is subject to the Commission's jurisdiction. We went on to explain:

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[5] PJM III, 95 FERC at 62,184; accord, PJM II, 94 FERC at 61,891 n.60; see also id. at 61,892 n.63.

[6] PJM III, 95 FERC at 62,185-86.

[7] Additionally, on July 9, 2002, Consolidated Edison Company of New York, Inc. (Consolidated Edison) filed with the Commission a motion for leave to file an answer to KeySpan's request for rehearing, which KeySpan moved to strike on July 24. As Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2002), does not permit such an answer, Consolidated Edison's motion is denied, and KeySpan's responsive motion is dismissed as moot.

> KeySpan has met its burden of showing that the current NYISO treatment of the transmission of station power in its operating manual is insufficient. To the extent that the delivery of station power is jurisdictional, its treatment must be addressed in the NYISO Services Tariff, not merely referred to in a subsidiary instrument.[8]

The Commission thus required the NYISO to file, within 90 days, a revised tariff conforming with the requirements of the May 15 Order.

5. On rehearing, KeySpan argues that the May 15 Order also should have rejected "the unsupported factual assertions" of intervenors Members of the Transmission Owners Committee of the Energy Association of New York State and Consolidated Edison Company of New York, Inc. that KeySpan "is served by local distribution facilities in the provision of station power" to its facilities.[9] According to KeySpan, because the "focus of [its] complaint" was on the issue of whether the self-supply of station power involves a sale, the record before the Commission did not "require drawings and other evidence showing that the facilities were FERC-jurisdictional interconnection facilities, rather than local distribution."[10] KeySpan goes on to allege that the delivery of its self-supply station power involves transmission facilities, and presents new evidence in support of its view.

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[8] 99 FERC at 61,679-80 (footnote omitted).

[9] KeySpan Request for Rehearing at 2.

[10] Id. at 7.

Discussion

6. The Commission will grant KeySpan's request for rehearing.

7. Whether the facilities at issue are transmission facilities raises issues of fact that should be determined in the context of a trial-type evidentiary hearing. Accordingly, we will set the issues of whether the facilities used to deliver station power are transmission facilities and, if so, what Commission jurisdictional rates are appropriate for deliveries of station power over those facilities[11] for investigation and hearing under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (1994), as ordered below. However, we will also hold the hearing in abeyance so that the parties may pursue settlement under our settlement judge procedures.

8. Where, as here, the Commission institutes an investigation and hearing on complaint under section 206 of the FPA, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months after the expiration of the 60-day period. In order to give maximum protection to customers, we will establish the refund effective date at the earliest date allowed. Therefore, we will establish the refund effective date at May 7, 2001.

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[11] The delivery of station power (self-supply or otherwise) over local distribution facilities, and the tariffs and rates for such services, would be subject to regulation by the appropriate state regulatory authority. See PJM II, 94 FERC at 61,890 n.60, and 95 FERC at 62,185.

9. Section 206(b) of the FPA also requires that, if the Commission has not rendered a final decision by the refund effective date, or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of that date. Here, given that the refund effective date has already passed, the Commission cannot follow that procedure.

10. Although we do not have the benefit of a presiding judge's report, based on our review of the record, we would expect that the presiding judge would be able to issue an initial decision within 12 months, or, assuming that the parties were not to settle but immediately go to hearing, by August 31, 2003. If the presiding judge were able to render a decision within that time, and assuming that the case does not settle, we estimate that we will be able to issue our decision within approximately 7 months of the filing of briefs on and opposing exceptions, or by April 30, 2004.

11. While we are setting an issue raised by KeySpan's complaint for investigation and hearing, in order that the parties may have an opportunity to reach mutual agreement without the necessity of a hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, and direct the Chief Administrative Law Judge to defer appointment of a presiding judge. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose. The settlement

judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) KeySpan's request for rehearing is hereby granted, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter 1), a public hearing shall be held in Docket No. EL01-50-001, concerning whether the facilities used to deliver Key-Span's self-supplied station power are transmission facilities and, if so, what Commission-jurisdictional rates are appropriate for delivery of such station power over those facilities, as discussed in the body of this order. However, we shall hold the hearing in abeyance to give the parties time to conduct settlement negotiations, as provided in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding with fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene

a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every thirty (30) days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If the settlement judge procedures fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

FILED
MAR 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2) (4)

Nos. 06-1010 and 06-1011

In the Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission acted lawfully in approving and enforcing a transmission tariff under which generators of electric power may net their "station power" consumption against their power output on a monthly basis.

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In the Supreme Court of the United States

No. 06-1010

NIAGARA MOHAWK POWER CORPORATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

No. 06-1011

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 452 F.3d 822.[1] The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-32a, 33a-69a, 70a-95a, 96a-137a, 138a-159a, 160a-194a, 195a-219a, 220a-247a) are reported at 101 F.E.R.C. ¶ 61,230, 107

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-1010.

F.E.R.C. ¶ 61,142, 105 F.E.R.C. ¶ 61,337, 110 F.E.R.C. ¶ 61,032, 105 F.E.R.C. ¶ 61,336, 110 F.E.R.C. ¶ 61,033, 109 F.E.R.C. ¶ 61,169, and 111 F.E.R.C. ¶ 61,120.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2006. Petitions for rehearing (Pet. App. 14a, 15a, 16a-17a) were denied on October 23, 2006. The petitions for a writ of certiorari in No. 06-1011 and No. 06-1010 were filed on January 18 and January 22, 2007 (Monday), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201 of the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. 824(b)(1). See *New York* v. *FERC*, 535 U.S. 1, 19-20 (2002). The States retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity. 16 U.S.C. 824(b)(1).

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). In 1996, the Commission adopted FERC Order No. 888, which directed public utilities subject to FERC's jurisdiction to offer non-discriminatory, open-access transmission ser-

vice.[2] To implement that directive, the Commission ordered the functional unbundling of wholesale generation and transmission services. See *New York*, 535 U.S. at 11. "Functional unbundling" requires each public utility to announce separate rates for its wholesale generation, transmission, and ancillary services. See *ibid.* Utilities also must take transmission service for their own wholesale sales and purchases under the same general tariff applicable to others, and they must separate their transmission and generation marketing functions and communications. See *ibid.* In its decision in *New York*, this Court upheld Order No. 888.

New York utilities went beyond the "functional unbundling" required by Order No. 888. After the order was adopted, utilities in New York "began divesting their generation facilities, and the vast majority of electricity generation in the state of New York is now performed by independent wholesale generators." Pet. App. 2a. Today, traditional utilities in New York maintain ownership of the transmission and local distribution facilities and provide retail service, while the not-for-profit New York Independent System Operator (NYISO) operates and controls the transmission grid. See *ibid.* The "merchant generators" who purchased the generation facilities divested by utilities have no

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[2] See *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (1996) (Order No. 888), clarified, 76 F.E.R.C. ¶¶ 61,009 and 61,347, order on reh'g, 62 Fed. Reg. 12,274 (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

retail-service obligation and sell wholesale power at market-based rates under FERC-approved tariffs. See, *e.g.*, *PJM Interconnection, L.L.C.*, 94 F.E.R.C. ¶ 61,251, at 61,883 n.12 (2001) (defining "merchant generator" as a "non-vertically integrated owner of generating facilities" that includes both independent and affiliated power producers).

2. These petitions arise from a set of FERC orders concerning the NYISO's treatment of "station power." Station power is "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment" at the site. *PJM Interconnection*, 94 F.E.R.C. at 61,889. A generating facility may "self-supply" its station power "behind the meter" by redirecting some of its outbound generated electricity for its station power needs. See *id.* at 61,890. But in certain circumstances, a generating facility may be incapable of self-supplying station power and therefore may look to the transmission grid for its station power needs. See *ibid.*

When utilities were vertically integrated, the treatment of station power was not an issue. Utilities have a longstanding practice of treating station power as "negative generation" and netting station power needs when measuring the output of a generator. That is, utilities historically have not charged themselves, their affiliates, or their fellow utilities for station power, even for periods when the generating unit was not operating. See *PJM Interconnection*, 94 F.E.R.C. at 61,882, 61,886, 61,889-61,890 & n.56. Instead, they have simply treated the generator as if it produced only its net output—that is, its gross power output minus the station power it consumed.

The treatment of station power became a disputed issue upon the entry of non-traditional merchant generators into the market. Merchant generators sought to obtain and account for necessary station power service in the traditional manner employed by traditional utilities—by netting station power needs against gross output. See *PJM Interconnection, L.L.C.*, 95 F.E.R.C. ¶ 61,333, at 62,189 (2001). If netting were not allowed, a generator that was unable to self-supply "behind the meter" would have to pay for its station power at state-approved retail rates.

In the *PJM Interconnection* orders, FERC permitted the independent operator of the grid in the Pennsylvania–New Jersey–Maryland area to allow netting on an hourly basis. See 94 F.E.R.C. at 61,892. For example, a generator that used the grid to obtain its station power for fifty minutes but then returned a greater amount of power during the next ten minutes would be deemed to have supplied the net amount and to have consumed nothing.

The Commission explained that netting "will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating facilities to the competitive disadvantage of merchant generators." *PJM Interconnection*, 94 F.E.R.C. at 61,893. Because vertically integrated utilities "generally own more generating facilities than merchant generators do," they "may be able to self-supply more often than merchant generators and may never have to pay another utility's retail rates for third-party supply of station power." *Ibid.* Likewise, vertically integrated utilities own transmission lines between their generating facilities, so they may never have to pay a

third-party's charges for transmission of station power. See *ibid.* Allowing netting by merchant generators, the Commission concluded, would therefore "limit if not fully eliminate disparities between merchant generators and vertically-integrated utilities." *Ibid.*

3. In the orders at issue here, the Commission affirmed merchant generators' ability to net station power uses over a reasonable period of time so as to enable those generators to procure station power competitively. Specifically, the Commission found that the NYISO's decision to use a one-month netting period was reasonable. See Pet. App. 27a-29a, 86a-87a, 148a-151a, 217a-218a. Under that approach, no retail sale occurs—and thus no retail charge is permissible—when a generator's net output, measured over one month, is positive.

4. Petitioners—a group of electric utilities and the State of New York—sought review of FERC's orders. The court of appeals denied the petitions for review. Pet. App. 13a.

Petitioners argued that monthly netting violates the FPA because it allegedly encroaches upon state jurisdiction over local distribution services and retail sales. See Pet. App. 7a. The court of appeals acknowledged that, as an abstract matter, this argument was "not insubstantial." *Id.* at 9a. But it concluded that petitioners' position was fatally undermined by their "clear concession" that an hourly netting period would be consistent with the statute. *Ibid.*

The court explained that "some practical accommodation is necessary" in drawing the jurisdictional lines between interstate transmission (the grid) and retail sales. Pet. App. 9a. Petitioners objected to monthly netting "because it eliminates many—perhaps virtually all—of the station power transmissions" from the cate-

gory of retail sales subject to state jurisdiction, "and a shorter netting period would eliminate fewer." *Id.* at 10a. But under petitioners' reasoning, "*any* netting out of what it deems 'retail sales' over *any* period would amount to a statutory violation." *Ibid.* That result would be inconsistent with petitioners' view that hourly netting is acceptable. See *ibid.* The court concluded that "if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act." *Ibid.*

Petitioners also argued that FERC Order No. 888 explicitly acknowledged state jurisdiction over delivery services to "end users" and drew no distinction between the typical industrial end user, who is susceptible to retail charges, and a wholesale generator that takes power from the transmission grid. See Pet. App. 7a. The court rejected that argument, explaining that the term "end user" in Order No. 888 could reasonably be interpreted to contain an exception for a non-traditional wholesale generator. See *id.* at 11a. In addition, the court noted that "petitioners' concession equally undermines their argument based on Order 888," since "[i]f generators must be thought of as equivalent to industrial end users," then hourly netting would be just as improper as monthly netting. *Ibid.*

Finally, the court of appeals rejected petitioners' argument that the Commission's decision to allow netting on a monthly basis, rather than over some shorter period of time, was arbitrary and capricious. See Pet. App. 11a. After examining FERC's explanation that "netting is necessary in order to put wholesale generators in roughly the competitive position integrated utilities enjoy," and petitioners' claim that "this competitive concern is really irrelevant in the New York market,"

the court concluded that "we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable." *Id.* at 12a.

ARGUMENT

In the orders at issue here, FERC acted reasonably to prevent discrimination against merchant generators that do not own electrical transmission facilities. The court of appeals correctly upheld the Commission's orders. Its decision is consistent with this Court's interpretation of the FPA in *New York* v. *FERC*, 535 U.S. 1 (2002), and it does not conflict with any decision of this Court or any other court of appeals. Petitioners argue that the court of appeals allowed FERC to assert jurisdiction over retail sales of electricity, a matter reserved to the States. That contention lacks merit and in any event would not be suitable for resolution in this case, because petitioners' concession in the court of appeals fatally undermined the logical premise of their argument. Further review is not warranted.

1. FERC's orders were a reasonable effort to ensure that non-traditional utilities—merchant generators without transmission facilities or a retail customer base—are not subject to undue discrimination at the hands of traditional utilities, in contravention of the nondiscrimination mandate of Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e. See *New York*, 535 U.S. at 6-7 (FERC is obligated under FPA Sections 205 and 206 to prohibit and remedy any unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission."). The court of appeals correctly upheld the Commission's action.

Historically, vertically integrated utilities netted out their station power needs. There was no need for FERC approval of such practices when services were bundled and utilities did not have to provide or take unbundled transmission service under open-access transmission tariffs. The transmission tariff that the Commission approved in this case simply affords merchant generators the same right to net their station power needs against their gross output that was historically afforded to New York utilities. The Commission has "never required that net output be measured on a real time or second-by-second basis"; rather, it always has allowed net output to be "measured over a reasonable time period, so as to take into account fluctuations in electric production." *PJM Interconnection*, 94 F.E.R.C. ¶ 61,251, at 61,892.

In accepting and enforcing the New York transmission-tariff provision that permits netting, the Commission acted to "eliminat[e] disparities between merchant generators" and other New York utilities. Pet. App. 28a; see *id.* at 52a ("netting is simply the traditional accounting for station power as negative generation"). A non-traditional merchant generator unable to net its station power needs, and forced to pay a retail rate for retail service it neither wants nor receives, would be placed at a competitive disadvantage in comparison with a traditional utility—like the former owner of the divested generator—that incurs no such additional charge. See, *e.g.*, *id.* at 192a (Commission acted to "permit[] merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets").

The court of appeals understood that the Commission has an obligation under the FPA to foster competitive,

non-discriminatory utility practices and to remedy undue discrimination. It properly traced the evolution of markets in New York, including the divestment of "the vast majority of electricity generation" in that State by "traditional utilities," which still "maintain ownership of the transmission and local distribution facilities," to "independent wholesale generators." Pet. App. 2a; see *id.* at 11a (wholesale generator is a "new creature in the market," one that is "in a quite different position from a retail user"). It recognized the Commission's reasoning that netting would "reduce the disparities between wholesale generators and vertically-integrated utilities." *Id.* at 6a. And it agreed with the Commission that the potential for such disparities continues to exist in New York, as New York merchant generators still compete with traditional New York utilities that either own generation capacity or that purchase generation for resale, as well as with merchant generators and traditional utilities in neighboring regions. See *id.* at 12a. In sum, the court of appeals properly appreciated the evolving nature of the electricity markets and the Commission's traditional regulatory responsibilities as applied to those markets. See *New York*, 535 U.S. at 23 (recognizing "the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935").

2. Petitioners argue (Pet. 15-25; 06-1011 Pet. 18-19, 23-25) that the court of appeals has sustained an order that exceeds FERC's statutory authority under the FPA. In their view, the Commission has improperly intruded on state authority over retail sales. Petitioners are incorrect. Far from ousting the States of their jurisdiction over retail sales of electricity, the court confined

both FERC and the States to their respective jurisdictional roles under the FPA.

The court of appeals correctly recognized that regulatory jurisdiction over electricity is "split between the federal government and the states." Pet. App. 2a. Citing Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), FERC's open-access transmission rulemaking in Order No. 888, and this Court's decision upholding that rulemaking in *New York*, the court of appeals accurately described the division of jurisdictional authority between the federal and state governments: (1) "FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce," while (2) "States retain jurisdiction over retail sales of electricity and over local distribution facilities." Pet. App. 2a-3a; accord *New York*, 535 U.S. at 17.

Focusing on the statutory recognition of authority for the States to regulate local distribution service and retail sales, petitioners argue (Pet. 13-15; 06-1011 Pet. 21-22) that the decision below sanctions FERC encroachment on state regulation. They contend that FERC's approval of monthly netting of station power undermines the States' discretion and policy to limit netting to just one hour or shorter. See *id.* at 14-17.

Petitioners' argument begs the question. By enacting the FPA, Congress allowed FERC effectively to limit state regulatory authority when FERC acts within its jurisdiction. See, *e.g.*, *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 49-51 (2003). Under the statute, FERC's jurisdiction extends to the "sale of electric energy at wholesale in interstate commerce" and "all facilities for [interstate] transmission or sale." 16 U.S.C. 824(b)(1). To exercise its jurisdiction, the

Commission must define when a wholesale sale occurs and when the facilities of interstate transmission are used to transmit power. In the orders at issue here, FERC did just that. Those orders reflect FERC's judgment that when a generator produces power but also consumes a smaller amount of station power during the netting period, it has engaged in a single "sale of electric energy at wholesale," and it has used transmission "facilities" only for that sale. 16 U.S.C. 824(b)(1). As the Commission explained, it is not "intrud[ing] into state jurisdiction over retail rates or local distribution services," but only "determin[ing] based on applicable law and fact what type of services (wholesale or retail) are actually being provided." Pet. App. 173a.

As the court of appeals recognized, the problem FERC confronted is essentially one of line drawing: "[I]n drawing the jurisdictional lines in this area, some practical accommodation is necessary." Pet. App. 9a. See *New York*, 535 U.S. at 16 (noting that "the electricity universe" is not "neatly divided into spheres of retail versus wholesale sales") (quotation marks omitted). The Commission's reasonable line-drawing in this area is entitled to deference. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (*Chevron* deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, *e.g.*, *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995); *CFTC* v. *Schor*, 478 U.S. 833, 844 (1986).[3]

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[3] Petitioners assert (Pet. 22-25) that the decision of the court of appeals is inconsistent with Section 212(h) of the FPA, 16 U.S.C. 824k(h). Petitioners do not allege that there is any conflict on this issue. In any event, their argument lacks merit because it is essentially

3. Petitioners argue (Pet. 11; 06-1011 Pet. 19) that the decision below is inconsistent with this Court's decision in *New York*. In fact, *New York* supports the decision of the court of appeals.

In *New York*, the Court held that FERC may draw reasonable lines to define the extent of its jurisdictional authority over wholesale sales and interstate transmission. 535 U.S. at 16-17. In particular, the Court determined that there is no statutory limitation on FERC's ability to define its jurisdiction over transmission in interstate commerce, see *id.* at 16, and that FERC's transmission jurisdiction extends at least as far as unbundled retail transactions, *id.* at 18. See *id.* at 27 (FERC jurisdiction "could very well" extend further to regulation of bundled retail transactions upon a finding of "undue discrimination in the retail electricity market"). Indeed, this Court, while recognizing that FERC does not have jurisdiction over local distribution service and facilities, accepted FERC's identification of a seven-factor test for distinguishing between FERC-jurisdictional transmission and state-jurisdictional local distribution. See *id.* at 22-23.

The fact that FERC is able to identify and define state-jurisdictional services, in order to distinguish those services from FERC-jurisdictional services, does not mean that FERC is able to assert jurisdiction over all defined services. See *New York*, 535 U.S. at 22-23. Here, the Commission assured petitioners that it has no intention of encroaching upon traditional state jurisdiction. See, *e.g.*, Pet. App. 26a-27a ("Any delivery of station power over local distribution facilities, and the com-

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derivative of their theory that the provision of station power to a generator is a retail sale even when that power is netted out by the generator's output.

pensation for such delivery is a matter properly for the New York Commission and not for this Commission.").

All that FERC did in these proceedings was to approve and enforce a FERC-filed transmission tariff that defines the amount of FERC-jurisdictional service a wholesale generator is receiving. More precisely, the Commission approved and enforced a definition of service under a FERC tariff that nets over one month the amount of electric power a wholesale generator both offers to the transmission grid and takes from the grid. Consistent with its earlier orders on the subject of netting, the Commission found that monthly netting in New York represented a reasonable period of netting. That action—and the decision of the court of appeals upholding it—was in no way inconsistent with *New York*.

4. Even if the question presented otherwise merited review, this case would be a poor vehicle for considering it because petitioners conceded away an essential premise of their argument when they acknowledged, before the court of appeals, that FERC would have the authority to allow netting over a one-hour period. See Pet. App. 9a-10a. No logical distinction separates netting over one hour and netting over one month. Thus, if hourly netting does not violate the FPA, then neither does monthly netting.

Petitioners contend (Pet. 26-27) that the court of appeals misunderstood the nature of their concession. Even if petitioners were correct, that case-specific question would not warrant review. In any event, the court's conclusion was amply supported by the statements of petitioners' counsel at argument. See 06-1011 Pet. App. 90a, 107a, 113a-116a. And contrary to petitioners' suggestion (Pet. 25-27; 06-1011 Pet. 13-14), the court of appeals did not view petitioners' willingness to accept

hourly netting to be a concession to jurisdiction where none otherwise exists. Rather, the court understood petitioners' concession as undermining the logic of their argument. See Pet. App. 9a. Since petitioners failed to present a cogent explanation of how the agency erred, the court appropriately upheld its orders. Cf. *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Federal Power Act (the "FPA" or the "Act") empowers the Federal Energy Regulatory Commission ("FERC" or the "Commission") to draw the line between its exclusive jurisdiction over the interstate transmission of electricity over the grid, and state jurisdiction over the retail market for electricity. In drawing that line here in the station power context, the Commission concluded that a generator buys no station power at retail in any month in which it was "net positive" because it supplied more power to the grid than it withdrew. Once petitioners agreed below that a generator does not purchase any station power at retail in any hour in which it was net positive, did any jurisdictional question remain for the court of appeals to decide?

2. Under FPA § 212(h), FERC may not mandate the provision of transmission services to retail customers. Does that section apply when petitioners agree that no retail sale is involved and the record shows that the provision of such services in this case is voluntary?

3. Petitioners contend that the court of appeals misunderstood the facts and misapprehended the analytical approach taken in *New York v. FERC*, 535 U.S. 1 (2002). Does the record support this contention and, even if it does, were these supposed errors of such moment that they would be "compelling reasons" under Rule 10 to grant the petition?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Respondent Competitive Generators submitting this brief are AES Eastern Energy, L.P., AES New York, LLC, AES Somerset, L.L.C., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Independent Power Producers of New York, Inc., KeySpan-Ravenswood, LLC., New York Power Authority, Nine Mile Point Nuclear Station, LLC, NRG Power Marketing Inc., Oswego Harbor Power LLC, PSEG Energy Resources & Trade LLC, PSEG Power New York, Inc., PSEG Power LLC, Sithe Energies, Inc., and Electric Power Supply Association, all of which were defendant-intervenors in support of FERC in the court of appeals.

KeySpan-Ravenswood, LLC has no subsidiaries and has not issued any securities to the public. Ravenswood is a direct, wholly owned subsidiary of KeySpan Corporation, a publicly held company that is traded on the New York Stock Exchange (symbol "KSE"). KeySpan Corporation entered into a merger agreement on February 25, 2006, with National Grid plc, a public limited company incorporated under the laws of England and Wales. This merger is pending, and will be consummated upon obtaining various regulatory approvals. Once the merger is consummated, KeySpan Corporation will be a wholly owned subsidiary of National Grid USA.

Nine Mile Point Nuclear Station, LLC is an indirect, wholly owned subsidiary of Constellation Energy Group, Inc., and does not issue securities to the public. Constellation Energy Group, Inc. issues securities to the public (NYSE ticker symbol "CEG").

New York Power Authority is a corporate municipal instrumentality and political subdivision of the State of New York. New York Power Authority has no parent companies,

subsidiaries, or affiliates that have any outstanding shares in the hands of the public.

AES New York, LLC ("AES NY"),
AES Eastern Energy, L.P. and
AES Somerset, L.L.C:

AES NY is an indirect, wholly owned subsidiary of The AES Corporation, a publicly held company. AES Eastern Energy, L.P., also an indirect, wholly owned subsidiary of the AES Corporation, is a limited partnership that includes AES Somerset, L.L.C., AES Cayuga, L.L.C., AES Greenidge, L.L.C., and AES Westover, L.L.C. No publicly held corporation owns 10% or more of the stock of The AES Corporation. The AES Corporation issues securities to the public (NYSE ticker symbol "AES").

Arthur Kill Power LLC ("Arthur Kill"),
Astoria Gas Turbine Power LLC ("Astoria"),
Dunkirk Power LLC ("Dunkirk"),
Huntley Power LLC ("Huntley"),
Oswego Harbor Power LLC ("Oswego") and
NRG Power Marketing Inc. ("NRG Power Marketing"):

NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego are subsidiaries of NRG Energy, Inc., a publicly held corporation. At this time, only NRG Energy, Inc. has issued shares to the public. NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego have not issued shares to the public.

PSEG Power LLC ("PSEG Power"),
PSEG Power New York, Inc. ("PSEG Power New York") and
PSEG Energy Resources & Trade LLC ("PSEG ER&T"):

PSEG Power is a wholly owned subsidiary of Public Service Enterprise Group Incorporated ("PSEG"). PSEG Power New York and PSEG ER&T are each direct or indirect, wholly owned subsidiaries of PSEG Power.

PSEG has publicly held common stock and debt securities outstanding. Public Service Electric and Gas Company ("PSE&G"), a wholly owned subsidiary of PSEG, has publicly held preferred stock and debt securities outstanding and PSEG Power has publicly held debt securities outstanding. PSEG Energy Holdings LLC, a wholly owned subsidiary of PSEG, has publicly held debt securities outstanding. PSE&G Transition Funding, LLC, and PSE&G Transition Funding II LLC, each wholly owned subsidiaries of PSE&G, have publicly held debt securities outstanding.

In addition, publicly held securities have been issued by Delaware Statutory Trusts under the control of PSEG. They are: (i) Enterprise Capital Trusts I, II, and III; and (ii) PSEG Funding Trusts I and II, each of which is under the control of PSEG and has publicly held preferred securities outstanding.

Sithe Energies, Inc. ("Sithe") does not issue securities to the public. Sithe is a direct, wholly owned subsidiary of ExRes Power Holdings, Inc. ("ExRes"), which is an indirect, wholly owned subsidiary of Dynegy Inc. ("Dynegy"). Dynegy is publicly traded on the New York Stock Exchange (symbol DYN). ExRes is not publicly traded. On September 15, 2006, Dynegy announced a proposed combination with LS Power Group. The transaction, which has been approved by the boards of directors of Dynegy and LS Power Group, and has met all necessary regulatory approvals, is expected to close by April 2, 2007.

Electric Power Supply Association is a national trade association that has no parent corporation and issues no publicly held stock.

Independent Power Producers of New York, Inc. is a New York State not-for-profit trade association incorporated under the laws of the State of New York.

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IN THE

Supreme Court of the United States

Nos. 06-1010 and 06-1011

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT COMPETITIVE GENERATORS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The facts are stated in the court of appeals opinion (App. at 1a-13a) and in the brief for the Federal Energy Regulatory Commission. The Competitive Generators accordingly treat the facts only briefly here.[1]

[1] The Competitive Generators are independent wholesale generators of electric power in New York that compete with vertically integrated

Introduction

This case involves the treatment of "station power" in New York. (App. at 4a.) "Station power" is the electricity used at a generating facility's site to power things such as start-up, heating, lighting, and office equipment. (App. at 4a.) The court of appeals identified circumstances in which a generator might have to withdraw station power from the transmission grid:

> When a generator is operational, it might well be capable of redirecting some of its outbound generated electricity to its station power needs, thus "self-supplying" its station power "behind the meter." Certain generators, however, are physically incapable of supplying their station power behind the meter—for example, if produced power goes out to the grid on one set of power lines, and the facility's offices and electrical equipment are connected to a separate set of lines coming in from the grid. And even for those capable of self-supplying behind the meter, there may be periods when a generator is non-operational or only partially operational and thus incapable of meeting its station power demand. In such instances, generators—who at least in this case, as we understand it, are connected directly to trans-

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utilities such as the petitioners in No. 06-1010 (the "Utilities") that monopolized the electric energy market in New York prior to deregulation.

The People of the State of New York and the Public Service Commission of the State of New York (collectively the "NYPSC"), intervenors before FERC and petitioners in the court of appeals, chose to file their own petition in this Court (No. 06-1011) ("NYPSC Pet."), which the National Association of Regulatory Utility Commissioners et al. support in an amicus curiae brief. Because the arguments advanced in both petitions and in the amicus brief suffer from the same infirmities, the Competitive Generators address all of them in this consolidated brief in opposition. Except where noted, the term "petitioners" refers to the petitioners and amici in both cases, and citations to "App." refer to the appendix in the Utilities' petition in No. 06-1010.

> mission facilities—must look to the grid for their station power supply.

(App. at 4a.)

The four pairs of FERC Orders about which petitioners complain are among the latest in a long line of FERC station power cases dating back to 2000, when the deregulation of New York's electrical energy market began. (App. at 4a-6a, 106a.) Each Order involves FERC's approval of a proposal by the manager of New York's electric power transmission facilities (the New York Independent System Operator ("NYISO")) to incorporate provisions for the "monthly netting" of station power in its tariff. (App. at 6a-7a.)

As the court of appeals explained (App. at 4a-5a), monthly netting allows generators to deduct, on a monthly basis, the station power withdrawn from the grid as "negative generation" from energy supplied to the grid during that month. So, for example, a generator that took station power off the grid for five days during a month, but then supplied well in excess of that amount during the other twenty-five days in the month, would be deemed to have supplied the netted amount to the grid and to have self-supplied its station power needs for that month.

Monthly Netting in the NYISO Tariff Is Used to Account for Station Power

The NYISO proposed monthly netting to enable it to minister its transmission tariff with respect to station power. (App. at 6a-7a, 22a.) Whenever station power is withdrawn from the NYISO grid, the NYISO has to determine (1) how much, if any, station power was withdrawn from the transmission grid, (2) how much, if any, of the station power was transmitted and (3) the applicable rate for either wholesale or retail transmission of station power. (App. at 146a-51a.)

The NYISO faces practical difficulties in making these determinations. Generators' supply of electricity to the grid and station power withdrawals can and do vary over any increment of time—even within a minute[2]—and electric power commingled in the grid cannot be traced to its source.[3]

Under the NYISO tariff:

- If a generator supplies more electric power to the grid than it takes station power from the grid during the month, the generator is considered to have self-supplied all of its station power, without having to purchase it from a third party.
- If a generator has multiple generating units and one of them supplies less power to the grid than it withdraws during the month, but another of its units supplies electricity to the grid in excess of the amount withdrawn, no sale of station power occurs and the generator is considered to have self-supplied station power from another of its units. Because the station power was transmitted on the grid from one of a generator's units to another, this transmission service is subject to wholesale transmission charges under the NYISO tariff.
- If a single unit supplies more electricity to the grid than it withdraws for station power, it self-supplied its

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[2] *See KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142 at P 39 (2004) ("generation output fluctuates instantaneously" and "varies constantly") (App. at 54a) (citations and internal quotation marks omitted).

[3] *See New York v. FERC*, 535 U.S. at 7 ("electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce"); *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 461 (1972) (power supplied to a grid "is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir").

station power. No transmission service occurred and therefore no transmission charges apply.

- If a generator withdraws more station power from the grid than it supplies during the month, the generator is considered unable to self-supply and to have purchased the amount of the deficiency from a third party in a retail sale. Transmission of such purchased power over the NYISO's system is subject to the applicable rate for the retail transmission of station power under the NYISO tariff.

(App. at 5a, 148a-49a, 321a.)

FERC Jurisdiction to Approve the NYISO Tariff

The NYISO had to obtain FERC's approval of the monthly netting period for station power because Congress gave the Commission exclusive jurisdiction in FPA § 201 over the transmission of electric power in interstate commerce. *See* FPA § 201, 16 U.S.C. § 824 (App. at 248a-51a). That jurisdiction encompasses the "unbundled" transmission of power sold at retail, also referred to as "retail transmission," "local delivery service," and "local distribution service." *See New York v. FERC*, 535 U.S. at 16-17.[4]

In each of the eight Orders, the Commission explained the jurisdictional line it had drawn, why it drew it where it did, and why that line did not impermissibly encroach on state jurisdiction. The following quotations from those Orders are illustrative:

> Jurisdiction over the provision of station power depends on how it is supplied:

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[4] Prior to the deregulation of the New York electric energy market, most electricity was sold by vertically integrated utilities that had built their own power plants, transmission lines, and local delivery systems. *Id.* at 5. Their "sales were 'bundled,' meaning that end users paid a single charge that included both the cost of the electric energy and the cost of its delivery." *Id.*

> As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of treating station power as negative generation . . . .[5]

(App. at 113a.)

The Commission must be able to determine whether facilities are transmission or local distribution facilities,

> and thus whether they are subject to our jurisdiction. Our authority to make this determination is not dependent on the ultimate outcome of the determination. . . . The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.
>
> . . . To the extent that delivery service is being provided, . . . this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities.

(App. at 115a-16a (footnote omitted).)

The NYISO's station power rules do not supersede state jurisdiction,

> "but merely apply traditional legal boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event

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[5] As the Commission noted, "integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as the new owners of the same, but now divested, generating facilities, they likewise would not be charged for station power." (App. at 230a n.24.)

> of a conflict between federal and state tariff provisions, the federal tariff provisions must control."

(App. at 55a-56a (citation omitted).)

Finally:

> A state may approve whatever retail rate level it deems appropriate . . . when a utility is, in fact, selling station power at retail or is, in fact, using local distribution facilities for the delivery of station power. When no station power service is being provided, and a merchant generator is self-supplying its station power requirements, a state cannot authorize a utility to charge and collect for station power service. Likewise, when no local distribution service to deliver station power is being provided, and a merchant generator is using only Commission-jurisdictional transmission facilities for station power deliveries, a state cannot authorize a utility to charge and collect for local distribution service.

(App. at 216a.)

FERC approved the NYISO's monthly netting of station power under the NYISO tariff. The Commission grounded its approval in part on its factual findings (not challenged here) that monthly netting most closely resembled historic and current practice under which utilities and state commissions do not treat "negative generation" as the purchase of station power at retail, and do not apply retail delivery charges to the utilities' own negative generation. (App. at 52a-53a.)

REASONS FOR DENYING THE PETITIONS

I. THE RECORD DOES NOT RAISE THE QUESTIONS PRESENTED

A. Petitioners' Agreement On The Facts Precludes Their Challenge To Monthly Netting

Before the Commission, the NYPSC and the Utilities urged FERC to adopt a "real-time" method of addressing station power, under which FERC would

> deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, *there would be no netting at all, only real-time measuring of output.*

(App. at 55a (emphasis added).) The Commission rejected this approach, because it "not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive." (App. at 55a.)

Evidently recognizing that the Commission was correct, at least about the impracticality and unprecedented nature of their real-time netting proposal, petitioners did not resurrect it in the court of appeals and do not try to revive it in this Court. Petitioners instead acknowledged on appeal that an hourly netting period in the NYISO tariff would be acceptable (App. at 9a), and beat a tactical retreat to the position that it was monthly netting that would not pass muster under the FPA. (App. at 10a.)

Thus, in their briefs and at oral argument below, petitioners agreed that no sale of station power occurs when the power a generator supplies to the NYISO-controlled grid exceeds its withdrawals from the grid over the course of an hour. (App. at 286a, 291a.) They likewise agreed that such hourly netting could properly be used under the FPA to determine the

amount of transmission service used by a generator and the applicable transmission charges under the NYISO tariff. (App. at 282a-84a, 294a.)[6]

The court of appeals held that petitioners' agreement on these facts foreclosed their argument that FERC lacked jurisdiction to approve any netting period for station power, and left only the reasonableness of the duration of the netting period (monthly versus hourly) for the court to decide. (App. at 9a-11a.)[7] To quote Senior Judge Edwards, petitioners' agreement "essentially conceded the hardest part of the case away. Because the fight then is whether [FERC is] arbitrary and capricious in using a month as opposed to an hour but most of the case is gone." (App. at 286a.)

Petitioners contend that the court of appeals misunderstood their agreement on the facts, but the record shows otherwise. Indeed, even in this Court, the Utilities acknowledge that FERC has jurisdiction to approve netting for transmission services. (Pet. at 10.) The NYPSC similarly acknowledges that it agreed to the NYISO's use of hourly netting, but argues that the court of appeals misapprehended the reason why the NYPSC did so. (NYPSC Pet. at 15-16.)

The court of appeals, however, got it exactly right: the NYPSC agreed to FERC-approved netting as a "practical accommodation" needed to perform the complex task of measuring generators' supply of power to, and withdrawals from, the NYISO-controlled grid. (App. at 9a-10a.) In light of petitioners' agreement on the facts in the court below, the

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[6] *See also* the NYPSC's reply brief in the court of appeals at 14. Under the heading, "Implementing One-Hour Netting Achieves the Necessary Result," the NYPSC argued that "the netting formula imposed in the NYISO should be supplanted with a one-hour netting period." *Id.*

[7] As the court of appeals ruled, petitioners' agreement also fatally undermines their argument that FERC Order No. 888 barred the Commission from approving monthly netting. (App. at 11a.)

case no longer presents a justiciable controversy. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (a federal court lacks the power to render a judgment on "a hypothetical state of facts"); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (an actual controversy "must be extant at all stages of review").

B. The Same Agreement Likewise Forecloses Any FPA § 212(h) Question

According to the Utilities (but, tellingly, not the NYPSC), the NYISO netting tariff requires retail wheeling of power, which FPA § 212(h) prohibits. FPA § 212(h), 16 U.S.C. § 824k(h) (App. at 269a-70a).[8] The argument proceeds from the assumption that retail sales occur even when a generator's injections into the grid exceed its station power withdrawals over the netting period. The Utilities' agreement that no retail sales occur when such netting takes place removes the factual basis for the premise. As the Commission put it, if there is no "retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise." (App. at 62a.)

Moreover, there is nothing "mandatory" about the Utilities' transmission of station power. Just the reverse is true: participation in the NYISO is voluntary. By choosing to participate in the NYISO and agreeing to NYISO control of their transmission facilities, the Utilities voluntarily agreed to abide by the NYISO's rules for, *inter alia*, the netting of station power to determine transmission charges. The FPA

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[8] "Retail wheeling" refers to the delivery (or "wheeling") of electric energy from a supplier to a consumer over transmission and/or distribution lines. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036, at 31,771 n.516 (1996); *see also New York v. FERC*, 535 U.S. at 9 (defining "wheeling" in the wholesale context).

does not prohibit FERC from regulating such voluntary agreements. To the contrary, the Act requires FERC to do so. FPA § 205, 16 U.S.C. § 824d (App. at 252a-55a).

C. No Jurisdictional Question Remained Once Petitioners Agreed On The Facts

Petitioners insist that the court of appeals ruled that parties can confer jurisdiction by agreeing or conceding that it exists, without the court having to make an independent inquiry to satisfy itself that Congress has done so. (Pet. at 26; NYPSC Pet. at 12-13.) One searches the record in vain, however, for any basis for petitioners' remarkable proposition that the entire court of appeals simply ignored this hornbook principle, even after petitioners cited it in their petitions for rehearing *en banc*. What one does find in the opinion is the panel's unanimous conclusion that petitioners agreed at oral argument that the case did not present the predicate facts necessary to make their jurisdictional arguments. (App. at 9a-11a.) Petitioners' contention ignores the fundamental distinction between agreeing that jurisdiction exists, and agreeing that the record does or does not contain the facts on which a finding of jurisdiction (or, again in this case, a finding of no jurisdiction) depends.

The court of appeals found, and petitioners recognized, that FERC has exclusive jurisdiction over the transmission of power over the grid. (App. at 7a, 9a.) Petitioners' complaint was that FERC's approval of the monthly netting tariff unlawfully extended that jurisdiction to cover retail sales. (App. at 281a.) But petitioners agreed that some form of netting was necessary, and that there was no retail sale if a generator was net positive over an appropriate netting period. (App. at 281a-84a, 292a-94a.) Once petitioners did so, the court of appeals had no need to examine the jurisdictional underpinnings for FERC's approval of netting by the NYISO,

and no reason to determine whether FERC had improperly intruded into state jurisdiction over retail sales.

II. NO COMPELLING REASON WOULD EXIST FOR GRANTING THE PETITIONS EVEN IF THE QUESTIONS WERE PRESENTED

A. Review Would Require This Court To Re-examine The Facts

Ironically, petitioners' attack on the court of appeals' understanding of petitioners' agreement as to the facts serves only to confirm why their petitions should be denied. If the Court were to grant the petitions, the Court would have to resolve factual disputes in order to reach the questions of law the petitions urge the Court to decide. Such an exercise would not be worthy of the Court's time and attention. *See* Rule 10.[9]

B. The Merits Questions Are Insubstantial

Nor are the issues that petitioners raise otherwise of such importance as to merit review. The ultimate issue decided by the court of appeals concerned whether FERC reasonably approved a monthly, rather than an hourly, netting period. The court affirmed FERC's decision on this routine regulatory matter, concluding that FERC acted neither arbitrarily nor capriciously. (App. at 11a-13a.) Petitioners do not seek review of this aspect of the court of appeals' decision.

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[9] This is particularly true given the limited impact of the FERC Orders at issue. As the Commission noted, the station power cases only affect "a small subset of merchant generators—those that neither purchase station power nor use local distribution facilities." (App. at 60a-61a.)

C. The Court Of Appeals' And FERC's Decisions Were Correct

1. *Petitioners' Arguments Beg the Question*

Each of the arguments petitioners advance suffers from the same flaw: it assumes its own conclusion. Petitioners urge review by this Court based on the premise that FERC interfered with the jurisdiction of the states over retail sales in violation of the purported jurisdictional limits in the Federal Power Act. But nowhere do petitioners explain why station power necessarily is sold at retail, or why the states, and not FERC, should set the jurisdictional boundary of the Act in the first instance. They simply assume that station power is sold at retail, and argue from that premise that states have exclusive jurisdiction over such sales.[10] Such circular reasoning alone justifies denial of the petitions.

2. *FERC's Jurisdiction Includes the Approval of Netting*

The netting of station power serves many purposes, including those that are exclusively federal. Those federal purposes include (1) identifying the source and destination of the electricity to determine whether and, if so, how much power was transmitted on the interstate grid; and (2) assessing which, if any, NYISO tariff transmission rate applies. In this latter respect, netting also is used to determine whether a retail sale occurred, which enables the NYISO to determine the applicable transmission rate.

The use of netting for federal purposes, standing alone, provides a sufficient basis for FERC's jurisdiction to review

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[10] (*See, e.g.*, Pet. at 15 (assuming existence of retail sales and then asserting that the court of appeals' decision ousts the states of authority to regulate them); NYPSC Pet. at 15 (FERC cannot regulate the self-supply of station power "because" it falls within the state's authority over retail sales); App. at 280a.)

and approve the netting period. FERC cited its FPA jurisdiction over transmission service as the basis for its authority to approve netting. (App. at 173a-74a.) Even the Utilities expressly acknowledge FERC's authority in this regard. (Pet. at 15 n.5.) Nothing more is required to establish a basis for FERC jurisdiction.

3. *New York v. FERC Confirms FERC's Jurisdiction*

Petitioners argue that because one of the uses of netting is to define when retail sales occur, FERC approval of such netting conflicts with this Court's decision in *New York v. FERC*. Petitioners are incorrect.

The fundamental question in *New York v. FERC* and here is the same: "whether FERC exceeded its jurisdiction" when it issued the Orders in question. *New York v. FERC*, 535 U.S. at 16. The NYPSC argued in *New York v. FERC*, as it does in its petition here, that the FPA draws a "bright jurisdictional line" between FERC and the states, and does not authorize FERC to draw a different line in exercising its powers under the Act. 535 U.S. at 17.

This Court ruled instead that the FPA does not draw such a jurisdictional line and that Congress empowered FERC, not state public utilities commissions, to set the jurisdictional boundary. 535 U.S. at 17, 19-20. Petitioners here do not like the line FERC drew in determining "when, in fact, such transmission [of station power] has taken place" and would have drawn it elsewhere. (App. at 174a.) Those arguments, however, no longer are open in the wake of *New York v. FERC*. The only question that could remain would be whether FERC acted arbitrarily and capriciously in drawing the line that it did in the exercise of its undisputed jurisdiction over transmission services. Petitioners, however, do not contend in this Court that FERC did so.

Moreover, the use of netting to define when retail sales occur, and to draw a line between federal and state juris-

diction, does not conflict with state jurisdiction over retail sales. Establishing criteria to define a term, such as "retail sale," is not the same as regulating the subject matter to which the term refers. This Court relied on this very distinction in *New York v. FERC* in affirming FERC's authority to interpret the contours of federal jurisdiction established by Congress in the FPA. As the Court held, the FPA empowers FERC to exercise this authority, even when it requires the Commission to establish and apply criteria to define the words "local distribution facilities," which refer to a subject of exclusive state regulation. 535 U.S. at 22-23.[11]

FERC's authority to approve netting rests on even firmer ground. Not only does FERC use netting to define when retail sales occur, and thus establish the limits of federal jurisdiction, but FERC also employs netting for exclusively federal purposes in the implementation of its transmission jurisdiction.

4. *Netting of Station Power Accords with Historic State Regulation*

FERC's approval of netting did not intrude on states' historic regulation of retail sales for another reason as well. As noted above, New York and other states traditionally regarded station power withdrawals from the grid as negative generation, and not as local distribution or retail sales subject to retail delivery charges. The Utilities' historic practice, and

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[11] The FPA likewise empowers the Commission to decide whether "facilities are used in local distribution," which "involves a question of fact to be decided by [FERC] as an original matter." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964). The Commission has this line-drawing definitional and fact-finding power even though "[s]ection 201(b) [of the FPA] expressly excludes [FERC] jurisdiction 'over facilities used in local distribution.'" *Id.* As the Commission emphasized in its station power cases, "the question of whether a particular merchant generator actually is using local distribution facilities" similarly is a case-specific fact for FERC to determine. (App. at 62a-63a.)

the NYPSC's long-standing approval of it, further expose the weakness of their challenge to FERC's approval of monthly netting in the NYISO tariff. In the Commission's words, "[a]llowing station power to be netted over a reasonable period of time, the [Utilities] claim . . . , is 'an astonishing situation' . . . . The [Utilities] do not explain, however, why they were comfortable with this 'astonishing situation' of netting station power when they owned the same generating facilities at issue here." (App. at 51a n.41.)

5. *The Orders Do Not Conflict with Order No. 888*

In Order No. 888, FERC found that former retail customers of utilities who previously purchased bundled sales and distribution services might try to avoid state-imposed stranded cost charges by using newly unbundled retail transmission services on the interstate grid.[12] To allow states to recover stranded costs from such former retail customers, FERC concluded that, notwithstanding its exclusive jurisdiction over all transmission of electric power in interstate commerce, including retail transmission, there nevertheless was an element of state interest in the unbundled transmission in interstate commerce of power sold to end users. Based on this legal construct or "fiction," FERC permitted states to add stranded cost charges to rates for retail transmission services, such as the rates adopted by FERC and referenced in the NYISO tariff.

In the Orders in this case, FERC held that Order No. 888's legal construct did not extend to generators' withdrawals of station power from the interstate grid, whether or not they were determined to be retail sales based on netting. The

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[12] Stranded costs are "costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become 'stranded' with the utilities." (App. at 3a.)

Commission so ruled because withdrawals of station power had never before been considered part of a bundled retail sale, and merchant generators were a new entity in the market and did not cause utilities to incur stranded costs. The withdrawal of station power from the interstate grid, therefore, did not involve the kind of deliveries to end users discussed in Order No. 888. The court of appeals rightly found FERC's reading of Order No. 888, namely that it "carve[d] out an exception from the term 'end user' for wholesale generators," to be "certainly a reasonable interpretation." (App. at 11a.)[13]

Finally, the Utilities (but, again, not the NYPSC) contend that FERC should have applied Order No. 888's seven-factor test to determine whether "paper facilities or meters" constitute local distribution facilities. (Pet. at 20.) But there was no reason for the Commission to have done so, as the delivery of station power through local distribution facilities was not at issue before the Commission (either because it was established that the plants in question connected directly to the transmission system, or because issues concerning the classification of facilities had been settled[14]).

In any event, the Utilities did not raise the issue in the court of appeals.[15] They therefore are precluded from pressing the

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[13] Contrary to the Utilities' assertion, the self-supply of station power was not at issue in *New York v. FERC*, nor is there anything in the decision that supports the Utilities' contorted interpretation of Order No. 888.

[14] *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 at PP 29, 22 (2003), *reh'g denied*, 110 FERC ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at PP 34, 36, 40, 47 (2003), *reh'g denied*, 110 FERC ¶ 61,032 at P 35 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 at P 53 (2004), *reh'g denied*, 111 FERC ¶ 61,120 (2005); *KeySpan-Ravenswood, LLC*, 101 FERC ¶ 61,296 (2002).

[15] The Utilities' failure to do so is not surprising. In another proceeding in which the Utilities are parties, FERC rejected this very argument in an Order (not involved here) issued three days before the Utilities filed their opening brief in the court of appeals in this case. *New York*

issue here. *See, e.g., Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 06-1011

In the Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK
AND THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF NEW YORK PSC

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Reply Brief in Support of Petition for Certiorari

The State of New York's January 19, 2007 Petition for Writ of Certiorari presented three important reasons to grant certiorari review of *Niagara Mohawk, et al. v. F.E.R.C.*, 452 F.3d 822 (D.C. Cir. 2006). First, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) erroneously found Federal Energy Regulatory Commission (FERC) jurisdiction to preempt state regulation of retail sales of electric energy because of an alleged concession, resulting from Petitioners' attempt to reach a practical accommodation with FERC that "netting" of station power could occur. Second, the Circuit Court erroneously upheld FERC's orders even though it found that FERC was not relying on its wholesale sales jurisdiction under the Federal Power Act (FPA) (Pet. App. 14a) and had not demonstrated how its transmission jurisdiction "permits it to determine that no sale *of any kind* – including a retail sale – takes place . . ." Pet. App. 15a. Third, the D.C. Circuit sanctioned FERC's preemption of state regulation of retail sales in contravention of the defined scope of FERC's statutory authority, which "shall not apply to any other sale of electric energy" than "the sale of such energy at wholesale in interstate commerce." 16 U.S.C.§ 824(a)(b), FPA § 201(a)(b).

In its Brief in Opposition to the petitions of New York and Niagara Mohawk Power Corporation (Niagara Mohawk) and the brief of Amicus Curiae National Association of Regulatory Utility Commissioners *et al.*, supporting Petitioners, FERC is simply silent in response to the litany of cases stating that a court may not uphold an agency's jurisdiction based upon a "concession." Petitioner New York Brief ("Pet. Br.") 13-14. Merchant Generators, however, while acknowledging New York's position is "hornbook law," incorrectly argue that Petitioners conceded as a

"predicate fact" that no retail sale occurs if a merchant generator is net-positive after an hour. Merchant Generators' Brief ("MG Br.") 11. Whether a "sale" takes place ultimately is a legal question, particularly insofar as it serves as a basis for federal jurisdiction.

FERC's new claim in opposition is to rely on a jurisdictional theory never advanced in its decisions – that netting of station power involves a "wholesale sale" of energy. FERC Brief ("FERC Br.") 11. This argument is contrary to the conclusion of the D.C. Circuit that FERC did not rely on its jurisdiction over wholesale sales of energy. This claim is also contrary to the underlying FERC orders, which concluded that station power involved an "end-use" of electricity not within FERC's jurisdiction. Pet. App. 315a. Such an end-use cannot be a "sale of electric energy to any person for resale," the definition of "wholesale sale" in 16 U.S.C. §824(d), FPA §201(d).

FERC and the Merchant Generators both argue that under *New York v. F.E.R.C.*, 535 U.S. 1 (2002), FERC's transmission jurisdiction allows it to preempt state jurisdiction over retail sales. FERC Br. 13 ["there is no statutory limitation on FERC's ability to define its jurisdiction over transmission in interstate commerce"]; MG Br. 14 [this Court ruled (in *New York v. F.E.R.C.*) that the FPA does not draw such a jurisdictional line and that Congress empowered FERC . . . to set the jurisdictional boundary"]. The D.C. Circuit has already rejected FERC's claim that FERC transmission jurisdiction allowed it to decide that merchant generators were not purchasing energy at retail. Respondents' claim as to the scope of *New York v. F.E.R.C.* is baseless because that case indicates that FERC's transmission jurisdiction does not reach retail sales. *New York v. F.E.R.C.*, 535 U.S. at 17, 21.

The Merchants Generators' attempt to convert a legal question into a baseless matter of fact, FERC's new reliance on its "wholesale sale" jurisdiction, Respondents' attempt to parlay FERC transmission jurisdiction into authority to determine when a retail sale has occurred and Respondents' continued inability to counter the D.C. Circuit's conclusion that FERC had not articulated a statutory basis for FERC jurisdiction to regulate retail sales all underscore FERC's lack of authority to assert jurisdiction over merchant generators' end-use energy. Both responding briefs bolster the importance of granting certiorari to annul the D.C. Circuit's decision.

POINT I

The D.C. Circuit's Conclusion Cannot Be Restated As A Matter Of Fact

Petitioners and 14 States pointed out the broad-reaching ramifications of allowing the D.C. Circuit's misinterpretation of the oral argument to justify conferring jurisdiction upon FERC where the FPA did not. Pet. Br. 11 [a State's policy accommodation should not alter the state and federal framework]; Amicus Curiae Br. 4 [upholding the Circuit Court's jurisdictional decision based upon "logic" too easily allows a State to lose its police powers].

In its Reply Brief, FERC did not address New York and Amicus Curiae's arguments or the cases supporting them. Instead, it merely restated the lower court's misguided conclusion as "logical" because Petitioners conceded an "essential premise." FERC Br. 8, 14-15. In contrast, the Merchant Generators see the D.C. Circuit decision as resting on a factual conclusion. They attempt to defend the D.C. Circuit's decision by arguing that the court never ruled "that

parties can confer jurisdiction by agreeing or conceding that it exists. MG Br. 11. The Merchant Generators apparently contend that New York's policy accommodation to accept one-hour netting amounted to New York's factual conclusion that no retail sale occurs with net-positive one-hour netting.[1]

The Merchant Generators err because the D.C. Circuit perceived the "concession" as a legal one "that an hourly netting tariff would not violate the Act . . ." Pet. 15a. An agreement that no "sale" occurs if a generator is net positive over an hour is not a "predicate fact" sufficient to confer jurisdiction over FERC. At most, it is a "practical accommodation" on New York's part not to challenge a FERC policy in the interests of resolving a jurisdictional dispute. Whether such accommodation is a jurisdictional concession can only be considered a question of law.

The D.C. Circuit erred by resting on New York's "concession" that FERC has jurisdiction under the FPA to impose one-hour netting, without any independent analysis to determine whether Congress had actually given FERC such authority. In doing so, the D.C. Circuit created a dangerous precedent under which the marginal difference between "ceding" jurisdiction and "conceding that FERC has jurisdiction" offers States little or no protection against federal preemption. The practical effect of the lower court's rigid reliance on its interpretation of a statement at oral argument will be to fundamentally undermine States'

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[1] Thus the Merchant Generators argue that "Petitioners' contention ignores the fundamental distinction between agreeing that jurisdiction exists, and agreeing that the record . . . does not contain the facts on which a finding of jurisdiction . . . depends." MG Br. 11. The Merchant Generators offer no case law in support of this "fundamental distinction."

willingness to try to compromise jurisdictional disputes with FERC.

POINT II

FERC's Post-Hoc Reliance On Its Statutory Authority Over Wholesale Sales Is Incorrect, Contradictory And Untimely

The D.C. Circuit recognized FERC's distinct and limited jurisdiction in the FPA -- over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce." Pet. App. 7a. It nonetheless upheld FERC's decisions pre-empting state jurisdiction over retail energy sales and services after finding that (1) FERC was not relying on its wholesale sales jurisdiction (Pet. App. 14a) and (2) FERC had not articulated how its transmission jurisdiction allowed it to define retail sales. Pet. App. 15a.[2] FERC now attempts to add a conclusion that the D.C. Circuit found it had not made by arguing that its wholesale sales jurisdiction allows it to force netting upon the States, claiming that the netting process is, in fact, "a single 'sale of electric energy at wholesale.'" FERC's proposition attempts to downplay the physical reality that "station power" means energy flows into a generating plant to supply the electrical end-use needs of the facility. Its contention is directly contradicted by FERC's

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[2] In claiming that "nowhere do petitioners explain why station power necessarily is sold at retail" (MG Br. 13), Merchant Generators apparently overlook Petitioners' explanations that, when a generator or its affiliate is not operating, it must purchase station power from the New York Independent System Operator (NYISO). Even though, at the end of a netting period, a merchant generator may have sold more wholesale power than consumed retail power, end use sales take place during any netting period. *See* Pet. App. 169a, 315a, Pet. Br. 5.

own findings, the express language of the Federal Power Act and the D.C. Circuit's decision.

FERC's new position is that "when a generator produces power but also consumes a smaller amount of station power during the netting period, it has engaged in a single 'sale of electric energy at wholesale.'" FERC Brief 12.[3] The FERC decisions under review, however, did not conclude that station power supply was a "wholesale sale." They determined that station power is an end-use service, "not subject to [FERC's] jurisdiction." Pet. App. 206a, 315a. That end-use service is necessary for heating, lighting, air conditioning and operation of electric equipment including office equipment and other on-site equipment. Pet. App. 195a.

Moreover, end-use energy, by the very terms of the FPA, cannot be a "wholesale sale." *See* 16 U.S.C. § 824 (d) ["'Sale of electric energy at wholesale defined.' The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person *for resale*"]. Emphasis added. Energy used by the generators to operate their facilities cannot be for resale because it is consumed on-site. Rather, a generator engaged in netting is purchasing energy at retail and offsetting those costs against its wholesale sales of energy.

Further, it was the purported *absence* of any sale upon which FERC reasoned that no *retail* sale occurs when a merchant generator nets its station power. Pet. App. 66a ["Nine Mile's self-supply of station power means there is no

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[3] While FERC's counsel at oral argument stated that FERC was relying on its jurisdiction over wholesale sales, that was FERC's first attempt to fit station power into a wholesale sale rubric.

sale . . ."]; *PJM Interconnection*, Order on Petitions for Declaratory Order and Supplemental Order on Rate Application, 94 F.E.R.C. ¶61,251, 61,890 (March 14, 2001)("*PJM II*") [" . . .a self-supplying generator is not using another's generating facilities . . . In other words, *there is no sale for end use or otherwise*," emphasis added]; *see* Pet. App. 305a. As a result, the D.C. Circuit decision was based upon FERC's conclusion that, during netting, "no sale *of any kind*" takes place (emphasis in original). Pet. App. 15a. It would be improper to uphold FERC's orders based on a jurisdictional conclusion advanced for the first time long after its orders were issued. *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80, 92 (1943) [overturning a Securities and Exchange Commission decision because "the considerations urged here in support of the Commission's order were not those upon which its action was based"].

FERC relies on a recent wholesale capacity rate proceeding, reviewed in *Entergy La. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), to argue that State jurisdiction must yield "when FERC acts within its jurisdiction" and FERC's exercise of its jurisdiction affects a State-jurisdictional retail rate. FERC Br. 11. This argument presumes that FERC had jurisdiction to set an energy rate, which is not the case here. In *Entergy*, FERC had jurisdiction to set a wholesale capacity rate, which affected a retail capacity rate. Here, FERC is not attempting to set a wholesale energy rate. It is suppressing state jurisdiction over *retail energy sales* by deciding that no retail sales have occurred without any authority to do so.

Finally, FERC references the deference afforded it in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), implying that it should be applied in this case. FERC Br. 12. The FPA, however, clearly and unambiguously limits FERC's

jurisdiction to the wholesale sale of energy, and FERC's orders have preempted state regulation of retail energy sales of energy. *See Presley v. Etowah County Commission, et al.*, 502 U.S. 491, 508 (1992) [wherein this Court stated it only defers to an administrative interpretation of a statute, "if Congress has not expressed its intent with respect to the question"].

FERC's attempt to rewrite its decisions at this late stage of the proceedings is not only unlawful; it also underscores the fundamental defect of the D.C. Circuit decision: Congress did not give FERC statutory authority to assert jurisdiction over end-use electric sales and services. The Circuit Court recognized this flaw and upheld FERC anyway. Certiorari is necessary to correct the D.C. Circuit's error.

POINT III

FERC Cannot Rely On Its Transmission Jurisdiction To Pre-empt State Jurisdiction Over End-Use Sales

New York's petition showed that FERC's interstate transmission authority under the FPA did not authorize FERC to order the NYISO to ignore end-use services merchant generators receive. Pet. Br. 20. The FPA distinctly preserves State jurisdiction over retail sales and services. The D.C. Circuit agreed that FERC had not shown an adequate nexus between its transmission jurisdiction and its determination that no retail sale occurred. Pet. App. 15a.[4]

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[4] FERC's characterization of the D.C. Circuit's finding that FERC lacked a statutory rationale as only "an abstract matter" (FERC Br. 6) is impossible since FERC's decisions are not theoretical at all. They very specifically wrest jurisdiction away from the States without a Congressional grant of power.

Respondents attempt to explain FERC's decision by arguing that its transmission authority may be extended to allow merchant generators to avoid paying for end-use retail sales and services. FERC Br. 9; *see* MG Br. 13 [where the Merchant Generators argue that in determining a *transmission rate,* netting can be used to conclude that no *retail sale* occurred]. Respondents rely on *New York v. F.E.R.C.*, which upheld FERC's retail transmission jurisdiction. That reliance is unavailing because *New York v. F.E.R.C.* recognized that the Federal Power Act preserved state authority over retail sales of energy. *New York v. F.E.R.C.*, 535 U.S. at 23 ["Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*"]. Moreover, the decision explicitly recognized that FERC's sales jurisdiction was limited and did not reach retail sales, stating that "[t]here is no language in the statute limiting FERC's *transmission* jurisdiction . . . although the statute does limit FERC's *sale* jurisdiction to that at wholesale." *New York v. F.E.R.C.*, 535 U.S. at 17. Therefore, while FERC may use netting to determine a *transmission* rate for delivering station power, the FPA does not authorize FERC to use netting to set the retail rate for the station power *energy* sold to merchant generators.

FERC and the Merchant Generators argue that because netting is the same as "negative generation," used to account for station power consumption by vertically-integrated utilities before divestiture, netting "accords with historic state regulation." FERC Br. 5; MG Br. 15. That States may have adopted a form of "netting" in the past does not mean that FERC has jurisdiction to impose it on them now.[5] What the

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[5] In another misstatement, Merchant Generators state New York's position has been that netting was "necessary" (MG Br. 11). New York has always

States may have done before divestiture is no basis for FERC jurisdiction. As FERC stated in its Reply Brief, "station power became a disputed issue upon the entry of non-traditional merchant generators into the market." FERC Br. 5. In other words, merchant generators, for which FERC recognized (FERC Br. 5) station power service is "necessary," are new entrants to the market and are fundamentally different than traditional "vertically-integrated" utilities. Their retail services are state-jurisdictional.

In sum, FERC and the Merchant Generators attempt to backfill FERC's decisions by arguing that FERC's transmission jurisdiction extends to retail energy sales. Not only do such arguments fail as a matter of law, they cannot cure the D.C. Circuit's decision. That decision found that FERC had not adequately explained its jurisdictional basis for intruding upon New York's jurisdiction to regulate retail services.

CONCLUSION

New York's petition for certiorari demonstrates that the D.C. Circuit decision affirming FERC is unlawful inasmuch as it recognized FERC supplied no statutory basis for asserting jurisdiction over retail sales and yet upheld FERC based upon its own, non-statutory, reasoning. In its opposition to certiorari, FERC failed to show otherwise. Petitioners and Amicus Curiae speak for millions of other end-use ratepayers who will bear the financial burden of merchant generators' free services when they ask this Court to review the D.C. Circuit's decision.

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maintained it would accept netting purely as a policy accommodation. Pet. Br. 8; Pet. App. 166a-167a.

Respectfully submitted,

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Brief *Amici Curiae* Of The National Association Of Regulatory Utility Commissioners, Public Utilities Commission Of The State Of California, State of Minnesota, State Of Oregon And Public Utility Commission Of Oregon, State Of Vermont, Vermont Public Service Board, And Vermont Department Of Public Service, Arizona Corporation Commission, Arkansas Public Service Commission, Connecticut Department Of Public Utility Control, Iowa Utilities Board, Kentucky Public Service Commission, Mississippi Public Service Commission, Montana Public Service Commission, North Carolina Utilities Commission, Virginia State Corporation Commission, Public Service Commission Of Wisconsin, And New England Conference Of Public Utility Commissioners In Support Of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Regulatory Utility Commissioners (NARUC) is a national organization, whose members are the State public service commissions in the fifty States (State commissions), including Petitioner Public Service Commission of the State of New York (NYPSC). NARUC has been recognized by Congress and the Courts as an appropriate representative for State commission interests. NARUC has no parent companies, subsidiaries or affiliates that have issued securities to the public. No publicly traded company owns any equity interest in NARUC.

The Attorneys General of the States of Minnesota, Oregon and Vermont are charged with representing their States in all matters in which their States have an interest, including utility matters, and with representing their State commissions before federal and state courts.

The Public Utilities Commission of the State of California, Arizona Corporation Commission, Arkansas Public Service Commission, Connecticut Department of Public Utility Control, Iowa Utilities Board, Kentucky Public Service Commission, Mississippi Public Service Commission, Montana Public Service Commission, North Carolina Utilities Commission, Public Utility Commission of Oregon, Vermont Department of Public Service, Vermont Public Service Board, Virginia State Corporation

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[1] In accordance with Sup. Ct. R. 37.2(a), the Public Utilities Commission of the State of California (CPUC) has obtained the consent of all parties to the filing of this brief, and the letters of consent are on file with the Clerk of the Court. In accordance with Sup. Ct. R. 37.6, this brief has not been authored in whole or in part by counsel for a party, and no person or entity, other than the CPUC, made a monetary contribution to the preparation and submission of this brief.

Commission and Public Service Commission of Wisconsin are State commissions established under the State Constitutions and/or the laws of their States. Among their duties, the State commissions exercise general regulatory jurisdiction over electric utilities and the provision of retail electric service within their respective States. In utility matters, the State commissions are charged with the protection of the people within their respective States and are authorized to represent them in proceedings before the Federal Energy Regulatory Commission (FERC) and courts reviewing FERC decisions.

The New England Conference of Public Utilities Commissioners (NECPUC) is a not-for-profit corporation, which is funded by the New England States and comprised of all the public utilities commissioners of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

NARUC, the States of Minnesota, Oregon and Vermont, the State commissions of Arizona, Arkansas, California, Connecticut, Iowa, Kentucky, Mississippi, Montana, North Carolina, Oregon, Vermont, Virginia and Wisconsin, and NECPUC (collectively, "State Commissions") have a vital stake in questions concerning State jurisdiction over retail sales of electric energy within the States and the police powers reserved for the States under the United States Constitution.

Since the early 1900s, the States have had jurisdiction over all retail sales of electric energy within their borders. In Commerce Clause cases, this Court has upheld the States' jurisdiction over such retail sales and service (*see Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)), and Congress explicitly

preserved this State authority in section 201(b) of the Federal Power Act of 1935, 16 U.S.C. § 824(b).

At issue in the present case is regulation of electric generation companies' purchases of electric energy, which is not self-supplied and which is used at the electric generating facilities for their heating, lighting, air-conditioning and office equipment (station power). These purchases are indistinguishable from retail sales service to any other large industrial electric customer for their heating, lighting, air-conditioning and office equipment. As the Petitioners clearly established in their petition, this case involves retail sales of electric energy and cannot be considered "transmission" or "wholesale sales," because the *energy* is consumed at the facilities and it is not available for resale.

Four years ago, this Court affirmed FERC's Order No. 888, which had recognized State jurisdiction over retail sales of electric energy and "carefully avoided assuming such jurisdiction. . . . Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*." *See New York v. FERC*, 535 U.S. 1, 23 (2002). In the present case, FERC asserted jurisdiction over the ultimate sale of the energy.

Amici Curiae State Commissions have a strong interest in this case, not only because it is the first time in history that a Court has upheld a Federal agency's regulation of retail sales of electric energy, but also because of the unprecedented way in which the D.C. Circuit justified FERC's encroachment upon the States' jurisdiction. The D.C. Circuit found the FERC's statutory justification "a bit confusing" and explicitly stated that FERC "has not

clearly articulated why that [transmission] jurisdiction allows it to determine that no sale of any kind – including a retail sale – takes place when the generator takes power from the grid." *See Niagara Mohawk Power Corporation v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) (*Niagara Mohawk*). Without any rational statutory justification for FERC jurisdiction, the D.C. Circuit's decision below rested upon a purported "concession" of jurisdiction by the New York utilities (Petitioners in No. 06-1010) and by the NYPSC (Petitioner in No. 06-1011). *See id.*[2]

If allowed to stand, the D.C. Circuit's decision represents an enormous threat to State sovereignty, because it would be a precedent for how easily a State could lose its reserved police powers if one of its attorneys in a brief or an oral argument makes a statement which the Court interprets or misinterprets to be a concession. Since the D.C. Circuit reviews a disproportionately high number of petitions challenging nearly all of the Federal agencies and involving myriad Federal statutes, this precedent is especially far-reaching and threatens the States in many areas beyond the Federal Power Act. *Amici Curiae* State Commissions will therefore focus on the ramifications of

[2] Although the New York utilities had agreed to FERC's hourly netting accounting policy, they acknowledged that they had no right to give up the State's jurisdiction over retail transactions. Consequently, the D.C. Circuit especially relied upon the oral argument, where the NYPSC's attorney agreed that it would be a valid "policy" judgment to determine that no retail sale occurred under hourly netting accounting. *See id.* Counsel for the NYPSC had not, in fact, conceded FERC *jurisdiction* over hourly netting for retail sales, but had agreed with the *policy* of hourly netting. The NYPSC disagreed, however, with a policy of monthly netting, which, as an accounting measure, would artificially make it appear that retail transactions taking place during certain days of the month did not occur. *See* Pet. App. 112a-115a.

this precedent even assuming *arguendo* that a concession were made, as the D.C. Circuit had erroneously found in its decision.[3]

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the D.C. Circuit's decision below would:

1) for the first time, provide that a State agency has authority to forever waive the police powers of the State by conceding an argument in litigation that it has no authority under State law to concede;

2) utilize the State agency's purported concession to confer jurisdiction upon a Federal agency over a subject matter, which a Federal statute explicitly preserved for State jurisdiction and explicitly precluded the Federal agency from regulating, and in doing so;

3) overall undermine the checks and balances in the United States Constitution by increasing the power of the Executive Branch of the Federal Government at the expense of the sovereign powers of the States and contrary to a law passed by Congress; and

[3] Certain of the *Amici* have jurisdictional disputes with FERC, which are distinguishable on both factual and legal issues from the present case before this Court. However, the potential threat of a State losing jurisdiction, based upon the D.C. Circuit's misinterpretation of a State agency's position as being a concession, is a universal problem for the States.

4) deter cooperative federalism by placing States at risk for agreeing with a Federal policy, which a Court may then treat as a concession of jurisdiction.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

The decision of the D.C. Circuit below is based upon the erroneous premise that a State agency or one of its attorneys has the authority to make a concession in litigation, which could forever waive the States' historic police powers over a given subject matter and confer jurisdiction on a Federal agency, when there is no statutory basis for the Federal agency's jurisdiction. However, the reserved powers of the States under the United States Constitution are not so precarious that they can be conceded away. This Court and State Supreme Courts have recognized that a State Legislature cannot waive the State's police powers, and the "reserved powers doctrine" precludes a State from bargaining away its police powers in a contract. In addition, the D.C. Circuit's decision is in direct conflict with Ninth Circuit and Seventh Circuit decisions which hold that State agencies cannot make concessions in litigation, which are contrary to their State law. The D.C. Circuit's decision is also contrary to this Court's finding that the healthy balance between the States and Federal Government in the United States Constitution cannot be undermined by the consent of the State, because the sovereign power of the State is ultimately to protect the people of the State.

In addition, the D.C. Circuit decision threatens the checks and balances within the three branches of the

Federal government by using the State's purported concession to circumvent Congress' explicit savings clause in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), which preserved State regulation over all retail sales of electric energy and specifically confined FERC's jurisdiction over sales to wholesale sales. This Court has found that Congress provided no exceptions to the bright line between Federal regulation over wholesale sales and State jurisdiction over retail sales of electric energy. Therefore, FERC and the courts may not create exceptions to the law when Congress has provided no exceptions. Moreover, this Court and other cases in the Ninth Circuit and D.C. Circuit have held that a party's consent does not confer jurisdiction upon a Federal agency when Congress has not granted the agency such jurisdiction.

By finding that a State concedes jurisdiction if it agrees with a policy of FERC, the D.C. Circuit decision below threatens the future of cooperative federalism as envisioned by the Framers of the Constitution and by Congress, as set forth in provisions of the Federal Power Act and numerous other Acts. If this decision were allowed to stand, it would deter coordination between the States and Federal Government, because States would not want to risk that such cooperation could be used against them and considered a concession of their jurisdiction.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

I. THE D.C. CIRCUIT'S DECISION SIGNIFICANTLY THREATENS THE RESERVED POWERS OF THE STATES UNDER THE UNITED STATES CONSTITUTION

A. The D.C. Circuit Decision Is Contrary To Decisions Of This Court And State Supreme Courts That State Officials Cannot Waive The State's Police Powers

"[T]he regulation of utilities is one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. at 377. Although this Court held that the Commerce Clause prevented the States' attempts to regulate the wholesale sales of electric energy in interstate commerce, this Court has also affirmed on numerous occasions that the Commerce Clause does not bar the States' regulation of the retail sales. *See id.* at 377-380. Moreover, section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), and its legislative history clearly demonstrate that Congress granted FERC jurisdiction over transmission and the sale of electric energy at wholesale in interstate commerce, but it also retained State jurisdiction over all retail sales of electric energy to the consumer. *See New York v. FERC*, 535 U.S. 1, 20, 23, 28 (2002); *see also Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 523-531 (1945). In section 201(b), Congress drew a bright line between Federal and State jurisdiction. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 214-216 (1964). "'It cut sharply and cleanly between sales for resale and direct sales for consumptive uses.'" *Id.* at 214-215 (quoting

Panhandle Eastern Pipe Line v. Public Service Comm'n, 332 U.S. 507, 517 (1947)).

Notwithstanding the importance of these police powers and the explicit language of section 201(b) of the Federal Power Act, the D.C. Circuit based its holding against State jurisdiction on the Petitioners' purported concession while, at the same time, the D.C. Circuit had rejected FERC's justification for its assertion of jurisdiction. *See Niagara Mohawk*, 452 F.3d at 828. Nowhere in the decision below does the D.C. Circuit independently find statutory support for FERC jurisdiction without this concession.

Contrary to the premise underlying the D.C. Circuit's decision, a State agency and its attorneys have no authority to make such a concession. Indeed, a State Legislature cannot abridge a subsequent legislature's police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977). Moreover, although there are limits on States under the Contract Clause, U.S. Const., Art. I, § 10, cl. 1, even when the State enters into a contract, the State cannot bargain away its police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. at 23-24. The law is clear that under the "reserved powers doctrine," the State may not give away an essential attribute of its sovereignty. *See U.S. v. Winstar Corporation*, 518 U.S. 839, 888 (1996). "[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Id.* at 888 n.33 (quoting *Atlantic Coast Line R. Company v. Goldsboro*, 232 U.S. 548, 558 (1914)).

In addition to being contrary to this Court's decisions, the D.C. Circuit's holding is in conflict with State Supreme Court decisions, which also hold that a State may not give away its police powers. *See, e.g., Avco Community Developers, Inc. v. South Coast Regional Com.*, 553 P.2d 546, 556, 17 Cal.3d 785, 800 (1976); *The Weber City Sanitation Commission v. R.G. Grant*, 87 S.E.2d 153, 159, 196 Va. 1140, 1149 (1955). If the State Legislature cannot give away its police powers and the State cannot enter into a binding contract to bargain away its police powers, how can a State agency or one of its attorneys make a concession in oral argument or in a brief, which gives up the police powers?

B. The D.C. Circuit Decision Directly Conflicts With Holdings In Decisions In The Ninth Circuit And Seventh Circuit That State Agencies Have No Authority To Make Concessions In Litigation Which Are Contrary To State Law

When a State agency is in litigation, it has no authority to make concessions which are contrary to State law. As the Ninth Circuit held in *Keith v. Volpe,* 118 F.3d 1386, 1393 (9th Cir. 1997), State officials "could not agree to terms which would exceed their authority and supplant state law." Similarly, the Seventh Circuit has held that State agencies may not enter into consent decrees to "liberate themselves from the statutes enacted by the Legislature that created them." *Kasper v. Board of Election Comm'rs of City of Chicago*, 814 F.2d 332, 341-342 (7th Cir. 1987). The D.C. Circuit's decision below is based upon a purported concession of a State's attorney, and it is therefore in a direct conflict with these Seventh and Ninth

Circuit decisions, which hold that the States' officials cannot consent to matters contrary to State law.

C. The D.C. Circuit Decision Undermines The Balance Of Power Between The States And Federal Government Under The United States Constitution

The federal system established by the United States Constitution preserves the sovereign status of the States and reserves substantial powers for the States. It relies upon a healthy balance of power between the States and Federal Government. *See Gregory v. Ashcroft,* 501 U.S. 452, 457-458 (1991). The "federalist structure of joint sovereign powers preserves to the people numerous advantages. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power." *Id.* at 458.

In the context of a State's challenge on Tenth Amendment grounds to a Federal statute, which the State's officials had previously supported, this Court held that the constitutional authority of Congress cannot be expanded and State authority narrowed by the "'consent' of state officials." *See New York v. United States*, 505 U.S. 144, 182 (1992). The Court found that just as the checks and balances between the three branches of the Federal Government could not be altered with their consent, the consent of State officials cannot change the constitutional plan and avoid their accountability to the people. *See id.* at 182-183.

For these same reasons, the constitutional authority of the Executive Branch of the Federal Government cannot be expanded and the State authority narrowed due to the purported concession of a State agency on an issue in

litigation. The reserved powers of the States under the Constitution preclude a Court from relying upon the concession, because if the State loses its police powers, it would ultimately be the people of the State who would suffer.

II. THE D.C. CIRCUIT'S DECISION DISRUPTS THE SYSTEM OF CHECKS AND BALANCES BETWEEN THE THREE BRANCHES OF THE FEDERAL GOVERNMENT

The D.C. Circuit decision disrupts the system of checks and balances, not just between the States and the Federal government, but also between the Executive, the Legislative and the Judicial branches of the Federal government. Because Congress may enact legislation in areas traditionally regulated by the States' police powers, it is an area in which Congress does not readily interfere. *Gregory v. Ashcroft,* 501 U.S. at 460-461.

Under section 201(b) of the Federal Power Act, Congress followed the federalist structure and not only preserved the States' police powers over retail electric sales, Congress also "specifically confined" FERC's jurisdiction over the sale of power to the wholesale market. *See New York v. FERC*, 535 U.S. at 23. Thus, FERC has no authority to decide accounting methods, which determine the extent to which retail electric sales take place to generators or any other end user, because jurisdiction over such retail sales was left to the States.

Congress could have treated generation, transmission, distribution and consumption of electric energy as if it were all transmission-related and subject to FERC jurisdiction. However, when Congress enacted the Federal

Power Act, it chose instead to protect the States' jurisdiction and to limit FERC's jurisdiction. *See Connecticut Light & Power Company v. Federal Power Commission*, 324 U.S. at 525-530. As this Court explained:

> Congress is acutely aware of the existence and vitality of state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. . . . It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.

Id. at 530.

Therefore, with regard to retail electric sales service, Congress consciously chose to retain the advantages of a decentralized government that underlie the United States Constitution, including that it "will be more sensitive to the diverse needs of a heterogeneous society . . . [and] allow more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. at 458.

In sharp contrast to FERC's careful avoidance in its Order No. 888 of assuming jurisdiction over retail sales of electric energy or disrupting the various States' retail service programs (*see New York v. FERC*, 535 U.S. at 23-24), FERC asserted jurisdiction below not only over unbundled *transmission*, but also over the ultimate sale of *energy*, which this Court recognized was subject to the States' jurisdiction. *See id.* at 23. The station power is energy that is sold to the generating facility for its consumption as power for its heating, air-conditioning, lighting

and office equipment. It is therefore not available for resale. As "direct sales for consumptive uses," these retail transactions clearly fall on the States' side of the bright line in the Federal Power Act. " 'No exceptions were made in either category for particular uses, quantities or otherwise.' " *Federal Power Commission v. Southern California Edison Company*, 376 U.S. at 214-215 (quoting *Panhandle Eastern Pipe Line v. Public Service Comm'n*, 332 U.S. at 517).

It is well settled that a Federal agency's jurisdiction is limited to what is authorized by statute. As this Court has held, an administrative " . . . agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). FERC, "[a]s a federal agency . . . is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.' " *California Independent System Operator Corporation v. Federal Energy Regulatory Commission*, 372 F.3d 395, 398 (D.C. Cir. 2004) (citations omitted).

Although FERC failed to "clearly articulate" the statutory authority under which it was acting, the D.C. Circuit attempted to make up for FERC's failure by using the purported concession of the NYPSC's attorney as justification for the station power exception to the States' retail sales jurisdiction. *See Niagara Mohawk*, 452 F.3d at 828. On a policy basis, the D.C. Circuit further found that FERC could carve out an exception from the term "end user" for generators which purchased station power, even though it was contrary to FERC's Order No. 888. *See Niagara Mohawk*, 452 F.3d at 829. This "flexible approach"

is precisely what this Court held Congress had rejected when it adopted the bright line with no exceptions to State regulation over sales to the ultimate consumers. *Federal Power Commission v. Southern California Edison Company,* 376 U.S. at 214-215. Congress drew a bright line "easily ascertained" to foreclose policy arguments to decide jurisdiction on a case-by-case basis. *See id.* at 215-216. "[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.'" *Freytag v. Commissioner*, 501 U.S. 868, 874 (1991) (citation omitted).

Moreover, the "exception" the D.C. Circuit creates for FERC is itself contrary to the law. As this Court has stated, "Parties, of course, cannot confer jurisdiction; only Congress can do so." *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973). Other courts have applied that rule of law directly to FERC. As the Ninth Circuit explained, "[t]he fact is that FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or out of FERC's jurisdiction." *Bonneville Power Administration et al. v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005). Similarly, " . . . jurisdiction cannot arise from the absence of objection, or even from affirmative agreement. To the contrary, 'as a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it.'" *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) (citation omitted).

The D.C. Circuit's expansion of the Executive Branch's authority at the expense of State jurisdiction undermines all of the checks and balances of the Constitution by utilizing a purported concession by a State agency to defy Congress' clear intent to retain the States' exclusive jurisdiction over retail sales of electricity.

III. THE D.C. CIRCUIT DECISION IS CONTRARY TO COOPERATIVE FEDERALISM AND WILL HAVE A CHILLING EFFECT ON COORDINATION BETWEEN STATE AND FEDERAL AGENCIES

The D.C. Circuit mischaracterized the NYPSC's determination to follow FERC accounting policies on hourly netting as a concession of jurisdiction. This is contrary to the most basic principles of cooperative federalism. The term "cooperative federalism" has been used by this Court to describe laws relying upon coordinated State and Federal efforts within a complementary administrative framework. *New York State Depart. of Social Services v. Dublino,* 413 U.S. 405, 413, 421 (1973). As this Court has held, where a State works in tandem with the Federal government "in the pursuit of common purposes, the case for federal pre-emption becomes a *less* persuasive one." *Id.* (emphasis added).

The D.C. Circuit's use of a State's acquiescence with a policy to confer jurisdiction on a Federal agency, works against the principles of cooperative federalism upon which the Federal Power Act and numerous other statutes depend. It sends a message to the States that they risk losing jurisdiction by taking actions consistent with a Federal agency's practices, regardless of the Federal statutory provisions and explicit savings clauses, such as in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b).

In matters involving electric regulation, there is a constant need for FERC and State commissions to coordinate. Their consideration of nonjurisdictional matters that are subject to each others' jurisdiction is "commonplace." *See, e.g., Federal Power Commission v. Conway Corp. et al.,*

426 U.S. 271, 280 (1976). In addition to the "savings clause" in section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), other sections make it clear that Congress intended close cooperation between the FERC and States. *See, e.g.,* sections 202 and 209(b), 16 U.S.C. §§ 824a and 824h(b).

Numerous other Acts of Congress also depend upon "cooperative federalism" for their success. For example, sections 1, 3A, 9(b), 11, 13 and 17 of the Natural Gas Act, 15 U.S.C. §§ 717, 717b-1, 717h(b), 717j, 717l, and 717p, necessitate close coordination between FERC and State agencies. "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it." *Panhandle Eastern Pipe Line v. Public Service Comm'n,* 332 U.S. at 517. However, in light of the D.C. Circuit decision, State commissions will have to be much more cautious about agreeing with FERC on a policy or else this Act, which was intended to help the States, could be used against the States.

The chilling effect of the D.C. Circuit decision has ramifications beyond Congress' energy policies. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) envisions cooperation between the Federal government and the States in addressing the complex and costly problems associated with hazardous waste remediation. *See New Mexico v. GE*, 467 F.3d 1223, 1244 (10th Cir. 2006). Under the logic of the D.C. Circuit's decision below, if a State agrees at first with just the Federal cleanup measures

(i.e., the floor set by CERCLA), it could risk its actions being interpreted as a concession that it has no jurisdiction. Thus, the floor could become its ceiling notwithstanding the clear language in the savings clause, 42 U.S.C. § 9614(a), establishing Congress' intent to allow supplemental State regulations. The same holds true for other Federal statutes, which are based upon cooperative federalism, where Congress provided for States to cooperate with the Federal Government while also preserving State jurisdiction.

If the D.C. Circuit decision is allowed to stand, it could therefore lead to less coordination between States and the Federal Government and undermine the objectives of Congress in many of the laws it has enacted. These laws, like the Constitution itself, reserved powers for the States, and the courts should not be able to thwart the States' rights by using their cooperative efforts against them.

CONCLUSION

For the reasons set forth above and the reasons stated in the petition, *Amici Curiae* State Commissions respectfully urge the Court to grant the writ.

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Respectfully submitted,

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